(22,446)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 187.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS WILSON, JOHN AQUILA WILSON, ADELAIDE BURY BROWN, PLAINTIFFS IN ERROR,

vs.

CHESTER A. SNOW.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 15, 1912.

1 In the Court of Appeals of the District of Columbia.

No. 2110.

MARY ELEANOR WILSON et al., Appellants,
vs.
CHESTER A. SNOW.

Supreme Court of the District of Columbia.

At Law. No. 48887.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS Wilson, John Acquila Wilson, Adelaide Bury Brown, Plaintiffs,

vs.

CHESTER A. SNOW, Defendant.

Ejectment.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed Oct. 23, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48887.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS Wilson, John Acquila Wilson, Adelaide Bury Brown, Plaintiffs,

vs.

CHESTER A. SNOW, Defendant.

Ejectment.

The above named plaintiffs, Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Acquila Wilson and
2 Adelaide Bury Brown, sue Chester A. Snow, the defendant above named to recover the possession of the following tract or parcel of land situate, lying and being in the District of Columbia,

being that tract and parcel of land known as Parts Lots 1 and 2 in James Dundas Trustee's Subdivision of Bayley's Purchase as per plat in C. J. U.—63 Begin at original corner edge of the Eastern Branch, thence North 15¾° East 4 Perches along the river, thence South 16½° East 121.61 perches to a stone on the West side of the Eastern Branch Road, thence with said road South 20¼° West 12.38 perches to edge of the said road, thence South 41° West 8.36 perches to edge of said road and Northeast corner of wooden bridge across said road, thence North 53° West 4.16 perches to center of the branch, thence North 80¾° West 10 perches to center of the branch, thence North 63¾° West 7.20 perches to center of the branch, thence North 57° West 5 perches to center of branch, thence North 55¼° West 4 perches to center of branch, thence North 37¾° West 6 perches to the center of the branch, thence North 45¾° West 25 perches to center of the branch, thence North 73¼° West 13 perches to center of the branch, thence North 53° West 9 perches to center of branch, thence North 81° West 8 perches to center of branch, thence North 73½° West 6 perches to center of the branch, thence North 83° West 6.68 perches to center of the branch, thence North 63° West 3.20 perches to center of the branch, thence North 78½° west 19 perches to a Sycamore Tree where Branch enters Eastern Branch, thence by said river in a straight line to beginning, except the part thereof conveyed to or condemned by the B. & O. R. R. Co.

The above described premises being the same that were conveyed by Adelaide Wilson to Leonard Huyck by deed dated March 8th, 1865 and recorded March 21st 1865 in Liber N. C. T. 55 at page 95 one of the land records of the District of Columbia and by the said Huyck by divers mesne conveyances to the defendant, (save and except the part thereof conveyed to or condemned by the Baltimore and Ohio Railroad Company) in which said described premises the plaintiffs claim the fee simple title and the plaintiffs were and became on or about the 28 day of March, 1906, entitled to the immediate possession thereof, but the defendant, Chester A. Snow wrongfully detains possession thereof and continues wrongfully to exercise acts of ownership thereon. Wherefore plaintiffs bring their suit and claim possession of the above described premises and the costs of this suit.

Second Count.

For a second and additional cause of action the plaintiffs, Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Acquila Wilson and Adelaide Bury Brown sue the defendant Chester A. Snow, for that they are the owners in fee simple of the following tract of land together with the improvements thereon and thereto appertaining and belonging, to-wit: Parts Lots 1 and 2 in James Dundas Trustee's Subdivision of Bayley's Purchase as per plat in C. J. U.—63. Begin at original corner edge of the Eastern Branch, thence
3 North 15¾° East 4 perches along the river, thence South 16½° East 121.61 perches to a stone on the West side of the Eastern Branch Road, thence with said road South 20¼° West 12.38 perches to edge of the said road, thence South 41° West

8.36 perches to edge of said road and Northeast corner of wooden Bridge across said road, thence North 53° West 4.16 perches to center of the branch, thence North 80¾° West 10 perches to center of the branch, thence North 63¾° West 7.20 perches to center of the branch, thence North 57° West 5 perches to center of branch, thence North 55¼° West 4 perches to center of branch, thence North 37¾° West 6 perches to the center of the branch, thence North 45¾° West 25 perches to center of the branch, thence North 73¼° West 13 perches to center of the branch, thence North 53° West 9 perches to center of branch, thence North 81° West 8 perches to center of branch; thence North 73½° West 6 perches to center of the branch, thence North 83° West 6.68 perches to center of the branch, thence North 63° West 3.20 perches to center of the branch, thence North 78½° West 19 perches to a Sycamore Tree where branch enters Eastern Branch, thence by said river in a straight line to beginning, except the part thereof conveyed to or condemned by the B. & O. R. R. Co. And plaintiffs aver that they became on or about the 28th day of March, 1906 entitled to the possession of the premises together with the occupation, use and profits thereof. Yet the defendant, Chester A. Snow, has retained and continues to retain the possession thereof and wrongfully to exercise acts of ownership thereon and retains and enjoys the occupation, use and profits of said premises, the clear value of the use and occupation of which, the said premises is $3000.00 per annum, and the plaintiffs aver that during his possession and occupancy thereof the defendant has done and caused and permitted to be done great waste and injury to the said premises to-wit, damages to the extent of $3,000.00 all to the damage of the plaintiffs in the sum of $6,000.00.

Wherefore plaintiffs claim damages in the sum of $6,000.00 besides the costs of this suit.

EUGENE CARUSI &
CHARLES F. CARUSI,
Attorneys for Plaintiffs.

Notice to Plead.

The defendant, Chester A. Snow, is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

EUGENE CARUSI &
CHARLES F. CARUSI,
Attorneys for Plaintiffs.

4 *Pleas.*

Filed Dec. 11, 1906.

In the Supreme Court of the District of Columbia.

No. 28887.

MARY E. WILSON et al.
vs.
CHESTER A. SNOW.

1. The defendant, for plea to the first count of the plaintiff's declaration, says he is not guilty as alleged.
2. The defendant moves to strike out the second count of the plaintiff's declaration, for duplicity.

WILLIAM F. MATTINGLY,
J. J. DARLINGTON,
Attorneys for Defendant.

C. F. Carusi, Esq., Attorney for Plaintiff:

Please take notice that the above motion will be calendared for hearing on Friday, December 14th, 1906, at 10 o'clock A. M. or so soon thereafter as counsel can be heard.

J. J. DARLINGTON,
Of Counsel for Def't.

Service of above motion accepted this 10th day of December 1906.
C. F. CARUSI.

Amended Second Count Filed by Leave of Court.

Filed Dec. 17, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48887.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS WILSON, JOHN ACQUILA WILSON, ADELAIDE BURY BROWN, Plaintiffs,

vs.

CHESTER A. SNOW, Defendant.

Ejectment.

For a second and additional cause of action the plaintiffs, Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Acquila Wilson and Adelaide Bury Brown, sue the defendant Chester

A. Snow, for that they are the owners in fee simple of the following tract of land together with the improvements thereon and thereto appertaining and belonging, to-wit: Parts Lots 1 and 2 in James Dundas Trustee's Subdivision of Bayley's Purchase as per plat in C. J. U. 63 Begin at original corner edge of the Eastern Branch, thence North 15¾° East 4 perches along the river thence South 16½° East 121.61 perches to a stone on the West side of the Eastern Branch Road, thence with said road South 20¼° West 12.38 perches to edge of the said road, thence South 41° West 8.36 perches to edge of said road Northeast corner of wooden bridge across said road, thence North 53° West 4.16 perches to center of the branch, thence North 80¾° West 10 perches to center of the branch, thence North 63¾° West 7.20 perches to center of the branch, thence North 57° West 5 perches to center of branch, thence North 55¼° West 4 perches to the center of branch, thence North 37¾° West 6 perches to the center of branch thence North 45¾° West 25 perches to center of branch, thence North 73¼° West 13 perches to center of the branch, thence North 53° West 9 perches to center of branch, thence North 81° West 8 perches to center of the branch, thence North 73½° West 6 perches to center of branch, thence North 83° West 6.68 perches to center of branch, thence North 63° West 3.20 perches to center of the branch, thence North 78½° West 19 perches to a Sycamore Tree where branch enters Eastern Branch, thence by said river in a straight line to beginning, except the part thereof conveyed to or condemned by the B. & O. R. R. Co. And the plaintiffs aver that they became on or about the 28th day of March 1906, entitled to the possession of the premises together with the occupation, use and profits thereof. Yet the defendant, Chester A. Snow, has retained and continues to retain the possession thereof and wrongfully to exercise acts of ownership thereon and retains and enjoys the occupation, use and profits of said premises, the clear value of the use and occupation of which, the said premises is $3,000.00 per annum, to the damage of the plaintiffs in the sum of $3,000.00.

Wherefore the plaintiffs claim damage in the sum of three thousand dollars besides the costs of this suit.

Third Count Filed by Leave of Court.

For a third and additional cause of action the plaintiffs, Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Acquila Wilson and Adelaide Bury Brown, sue the defendant Chester A. Snow, for that they are the owners in fee simple of the following tract of land together with the improvements thereon and thereto appertaining and belonging, to-wit: Parts Lots 1 and 2 in James Dundas Trustee's Subdivision of Bayley's Purchase as per plat in C. J. U.—63 Begin at original corner edge of the Eastern Branch thence North 15¾° East 4 perches along the river, thence South 16½° East 121.61 perches to a stone on the West side of the Eastern Branch Road, thence with said road South 20¼° West 12.38 perches to edge of the said road, thence

South 41° West 8.36 perches to edge of said road and North-
6 east corner of wooden bridge across said road, thence North 53° West 4.16 perches to center of the branch, thence North 80¾° West 10 perches to center of the branch, thence North 63¾° West 7.20 perches to center of the branch, thence North 57° West 5 perches to center of the branch, thence North 55¼° West 4 perches to center of the branch, thence North 37¾° West 6 perches to the center of the branch, thence North 45¾° West 25 perches to center of the branch, thence North 73¼° West 13 perches to the center of the branch, thence North 53° West 9 perches to center of the branch, thence North 81° West 8 perches to center of the branch, thence North 73½° West 6 perches to center of the branch, thence North 83° West 6.68 perches to center of the branch, thence North 63° West 3.20 perches to the center of the branch, thence North 78½° West 19 perches to a Sycamore Tree where branch enters Eastern Branch, thence by said river in a straight line to beginning, except the part thereof conveyed or condemned by the B. & O. R. R. Co.

And the plaintiffs aver that they became on or about March 28th, 1906, entitled to the possession and enjoyment of said premises without waste and injury thereto by the defendant. Nevertheless the defendant, Chester A. Snow, has retained and continues to retain possession of the premises and wrongfully exercise acts of ownership thereon and during his possession and occupancy thereof has committed and does and continues to commit and do great waste and injury to the said premises to-wit damages to the extent of $3,000.00.

Wherefore plaintiffs claim damages in the sum of three thousand dollars besides the cost of this suit.

CHARLES F. CARUSI,
Attorney for Plaintiffs.

Notice to Plead.

The defendant, Chester A. Snow, is to plead to the amended second and additional third count of the plaintiffs' declaration on or before the twentieth day, exclusive of Sundays and legal holidays occurring after the day of service hereof otherwise judgment.

CHARLES F. CARUSI,
Attorney for Plaintiffs.

Pleas to Amended Declaration.

Filed Dec. 27, 1906.

In the Supreme Court of the District of Columbia.

No. 48887.

MARY ELEANOR WILSON et al.

vs.

CHESTER A. SNOW.

II. To the second count of the plaintiffs' declaration, as amended, the defendant says that he is not indebted as alleged.

7 III. For plea to the third count of the said declaration as amended, the defendant says that he is not guilty as alleged.

WM. F. MATTINGLY,
J. J. DARLINGTON,
Attorneys for Defendant.

Motion for Leave to Amend.

Filed Apr. 2, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48887.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS Wilson, John Acquila Wilson, Adelaide Bury Brown, Plaintiffs,

vs.

CHESTER A. SNOW, Defendant.

Ejectment.

Now come the plaintiffs, by their attorney, and ask leave of Court to amend their declaration by making the following correction and change in the description of the property contained in the first and the amended second and third additional counts thereof as follows, to-wit:

The second course of the description of the property in suit to read "thence south 63½ degrees E. 121.61 perches" instead of south 16½ degrees E. 121.61 perches; and second by inserting after the fourth course in said description the words following in quotation marks, "thence south 48 degrees W. 12 perches to the edge of said road."

C. F. CARUSI.

I consent.
J. J. DARLINGTON,
For Defendant.

Supreme Court of the District of Columbia.

* * * * * * *

TUESDAY, *April 2nd*, 1907.

Session resumed pursuant to order of Court, Hon. Thos. H. Anderson, Justice, presiding, the Court being opened by proclamation of the United States Marshal in and for the District of Columbia.

* * * * * * *

8 No. 48887. At Law.

MARY E. WILSON et al.
vs.
CHESTER A. SNOW.

Upon motion of Plaintiffs' attorney in open Court, consented to by defendant's attorneys leave is hereby granted said plaintiffs to amend the declaration herein forthwith.

Memorandum.

October 18, 1909.—Verdict for Defendant.

FRIDAY, *October* 22, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 48887.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS WILSON, JOHN ACQUILA WILSON, ADELAIDE BURY BROWN
vs.
CHESTER A. SNOW.

Upon hearing the plaintiffs' motion for a new trial, it is considerthat the same be and hereby is overruled, and judgment on verdict ordered.

Therefore it is considered that the plaintiffs take nothing by their suit, and that the defendant go thereof without day, and recover against the plaintiffs the cost of his defense, to be taxed by the clerk, and have execution thereof.

The plaintiffs in open court note an appeal to the Court of Appeals of the District of Columbia, and upon motion the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100) or, in lieu thereof a deposit of Fifty dollars ($50).

Memoranda.

November 9, 1909.—$50 deposited in lieu of bond on appeal.
November 12, 1909.—Bill of exceptions submitted.
Time to file record extended to January 10, 1909.

In the Supreme Court of the District of Columbia.

FRIDAY, *January* 7, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

9 At Law. No. 48887.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS WILSON, JOHN ACQUILA WILSON, ADELAIDE BURY BROWN, Pl't'fs,

vs.

CHESTER A. SNOW, Def't.

Now come here the plaintiffs by their attorneys and pray the Court to sign, seal and make part of the record, their bill of exceptions taken during the trial of this cause, (heretofore submitted) now for then, which is accordingly done.

Bill of Exceptions.

Filed Jan. 7, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 48887.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS Wilson, John Acquila Wilson, Adelaide Bury Brown, Complainants,

vs.

CHESTER A. SNOW, Defendant.

Be it remembered that the above mentioned cause came on for trial on the 16th day of October, A. D. 1909, before Mr. Justice Wright and a jury, Messrs. Charles F. Carusi and Eugene A. Jones appearing on behalf of the plaintiffs and Messrs. J. J. Darlington, William F. Mattingly and Charles A. Douglas appearing on behalf of the defendant, and thereupon the plaintiffs, to maintain the issues upon their part joined, read in evidence a stipulation filed in the cause, which said stipulation is in manner and form as follows:

In the Supreme Court of the District of Columbia.

At Law. No. 48887.

MARY ELEANOR WILSON et al.
vs.
CHESTER A. SNOW.

Stipulation.

It is stipulated and agreed by and between the parties hereto by their respective counsel,—that the property described in the declaration, and now in the possession of the defendant, is claimed by the plaintiffs and defendant through John H. A. Wilson,
10 who died seized and possessed thereof February 28, 1858, the plaintiffs claiming as heirs at law and devisees of said Wilson, and the defendant claiming under the will and conveyances appearing in the chain of title hereto annexed, and the continuous possession had by him and those under whom he claims.

It is further stipulated that the will of said John H. A. Wilson was duly executed and probated so as to pass title to real estate, that Thomas O. Wilson mentioned in said will died September 21, 1858, that the deeds mentioned in said chain of title were duly executed, acknowledged and recorded according to law; that the property described therein included the property described in the declaration, and that the record of said will and proceedings thereunder and the aforesaid conveyances may be read in evidence if desired by either party without formal proof.

J. J. DARLINGTON,
WM. F. MATTINGLY,
Attorneys for Defendant.
CHARLES F. CARUSI,
Attorney for Plaintiffs.

Chain of Title.

Will of John H. A. Wilson, Book 7, p. 527.

Adelaide Wilson, executrix of John H. A. Wilson and in her own right,
to
Leonard Huyck.

Deed. Consideration mentioned, $3,225.00.

Leonard Huyck
to
Jesse V. N. Huyck.

Deed of Trust. Liber N. C. T. 55, folio 77, March 8, 1865.

Leonard Huyck
to
Leonidas Coyle.

Deed of Trust. Liber R. M. H. 16, folio 153, May 8, 1866.

Jesse V. N. Huyck,
Leonidas Coyle,
to
Annie S. Coyle.

Trustees' Deed. Liber E. C. E. 4, folio 454, May 7, 1867.

11 Annie S. Coyle
to
Robert H. Jordan.

Deed. Liber 957, folio 455, October 1, 1880.

Robert H. Jordan
to
Annie S. Coyle.

Deed. Liber 1073, folio 152, Jan. 8, 1884.

Annie S. Coyle
to
George Mason.

Deed. Liber 1136, folio 488, Aug. 19, 1885.

George Mason
to
George B. Starkweather.

Deed. Liber 1294, folio 152, July 7, 1887.

George B. Starkweather
to
Winfield S. Jenks.

Deed. Liber 2306, folio 419, June 23, 1898.

Winfield S. Jenks
to
Thomas J. Giles.

Deed. Liber 2870, folio 216, February 15, 1905.

Thomas J. Giles
to
Chester A. Snow.

Deed. Liber 2870, folio 218, June 22, 1905."

And it was further stipulated and agreed between counsel in open Court that the value of the land in controversy exceeded the sum of $5,000.00 and thereupon counsel for the plaintiffs read in evidence the will of John H. A. Wilson, which was in the words and figures following:

"In the name of God, Amen:

I, John H. A. Wilson of the County of Washington, in the District of Columbia, being weak in body, but of sound and disposing mind, memory and understanding, considering the certainty of death, and the uncertainty of the time thereof, and being desirous of settling my worldly affairs, and thereby be the better prepared to leave this world when it shall please God to call me hence, do
12 therefore make and publish this my last Will and Testament, in manner and form following, that is to say,—

First, and principally, I commit my soul into the hand of Almightly God, and my body to the earth, to be decently buried at the discretion of my executrix hereinafter named, and after my debts and funeral expenses are paid, I devise and bequeath as follows:

I give and devise unto my dearly beloved wife, Adelaide Wilson all my real and personal property during her single life, for the Education and support of herself and my children hereinafter named, and in case of the marriage of my said wife, then she shall forfeit all claim, interest, and estate hereby devised to her, except what is allowed by law, to a widow, and in case of the death or marriage of my said wife, then and in either event, I devise and bequeath all my estate real and personal to my affectionate brother Thomas O. Wilson, in trust, for the use and benefit of my dear children, Mary Ellen Wilson, William Harris Wilson, Adelaide Berry Wilson, John Acquila Wilson, and Amelia Maria Wilson, share and share alike, and authorize and empower my said brother to exercise his own judgment and prudence in the discharge of the duties hereby confided to him,—and it is my wish and desire that my executrix and executor hereinafter named shall and may at any time they shall deem best and to the advantage of my said wife and children, sell and convey any part or all of my real and personal estate, and invest the proceeds in good stocks or otherwise, as they may consider, best, for the benefit of my said wife and children; in fact, to exercise a sound discretion in the management, disposition and investment of my said estate for the purpose aforesaid, to wit, for my wife and children. It is my wish and desire that in the event of its being necessary to dispose of my servants, that they are not to be carried out of the District of Columbia, unless their conduct merits a different disposition to be made of them or

either of them — and under no circumstances is my servant man Charles to be ill treated, unless his conduct merits it, but so long as he proves himself faithful as he has heretofore done, he is to meet with good treatment from my executrix and executor and to be properly taken care of by them.

And lastly, I do hereby constitute and appoint my dear wife, Adelaide Wilson executrix and my affectionate brother Thomas O. Wilson executor of this my last will and testament, revoking and annulling all former wills by me heretofore made, ratifying and confirming this and none other to be my last will and testament.

In testimony whereof I have hereunto set my hand, and affixed my seal, this — day of October in the year of our Lord One thousand eight hundred and fifty-seven.

The words "Education and" being interlined on the first page before signing.

JOHN H. A. WILSON. [SEAL.]

Signed, sealed, published and declared, by John H. A. Wilson the above named testator, as and for his last will and testament, in the presence of us, who at his request, in his pres-
13 ence, and in the presence of each other, have subscribed our names as witnesses thereto.

REZIN ARNOLD.
WATKINS TOLSON.
JAMES H. DANFORD.

Orphan's Court, March 20, 1858.

DISTRICT OF COLUMBIA,
Washington County, To wit:

This day appeared Rezin Arnold, Watkins Tolson & James H. Danford, the three subscribing witnesses to the foregoing last will and testament of John H. A. Wilson late of Washington County aforesaid, deceased & severally made oath on the Holy Evangels of Almighty God, that they did see the testator therein named sign and seal this will; that he published, pronounced and declared the same to be his last will and testament, that at the time of so doing he was to the best of their apprehensions of sound and disposing mind, memory and understanding & *and* that they respectively subscribed their names as witnesses to this will; in the presence and at the request of the testator and in the presence of each other.

Test:

ED. N. ROACH,
Reg. Wills."

And thereupon, further to maintain the issues upon their part joined, the plaintiffs gave evidence by the following witnesses tending to prove as follows:

ADELAIDE BURY BROWN, one of the plaintiffs testified that she and her brothers and sisters, the plaintiffs in this cause, were the chil-

dren of John H. A. Wilson, and she further identified certain family Bibles from which entries were read to the Court and jury, tending to show that John H. A. Wilson, the testator, was born April 28, 1820, and died February 25, 1858, and that at the date of the execution of his will he was thirty-eight years old; that their mother, Adelaide Wilson was born in 1829 and died March 28, 1906; that Thomas O. Wilson was born December 25, 1818—was at the time of the execution of the will forty years of age; that he was a farmer and mill owner in Prince George County Maryland, and died September 21, 1858; that the ages of the children were as follows: Mary Eleanor Wilson ten years old (born March 23, 1848), William H. Wilson born September 5, 1850; Adelaide B. Brown March 18, 1853; John A. Wilson May 18, 1854; Amelia M. Wilson November 25, 1857.

On cross-examination this witness testified that she was born on the property in suit and that the family resided upon it for some years after the death of their father, namely until its sale, and thereafter in Anacostia with their mother. That the testator John H. A. Wilson was a farmer and that he owned no property at the time of his death except his farm.

14 JAMES C. TAYLOR, Deputy Register of Wills, testified that he was Deputy Register of Wills and that he was familiar with the records of the Register of Wills' Office. He stated that in response to a request by the counsel for the plaintiffs he had made a search of the records of his office but that the only papers or entries relating to the will or estate of John H. A. Wilson which he found, among the existing records was the will with an endorsement in writing thereon to the effect that it had been approved and signed by Register of Wills, Roach, and an entry in a book that the will had been approved and filed. He also testified that he found no other entries or papers to indicate that either Adelaide Wilson or Thomas O. Wilson had ever qualified as executors or received letters testamentary. On further examination the witness testified, that he had occasion to examine the records during the Registership of Mr. Roach, and found them defective; that the Bond book from Dec. 30, 1856 to April 20, 1861, was missing, in which book this bond of the executors of John A. Wilson would be recorded if they gave one, that the accounts are missing from Dec. 9, 1854 to 1861, and that there are no records from 1856 to 1861; that he did not know whether the qualification of executors would be shown by the bond books alone—that he could not tell, that he never examined, that he thinks the docket would show during this period, and that he could not say whether Mr. Roach kept separate docket for every case; that if docketed, the entry would appear in the docket, and that he knows positively this case does not appear on the docket.

Thereupon plaintiffs closed their case and the defendant to maintain the issues on his part joined, called as witness Mr. WILLIAM F. MATTINGLY, one of the counsel for the defendant who

testified substantially as follows, to wit: That he had been a member of the Bar for 49 years that from 1857 to 1860 he was a student at law in the office of one of the older practitioners and had transcated considerable business in the Probate Court which was held in the room where the Court of Appeals now sits; that the office was conducted in a loose and negligent manner; that he had joined in a movement to compel a reform in this particular; that on one occasion he visited the office in order to find a written renunciation by an executor and that no entry or other evidence of the existence of such a paper was contained in any book in the office of the Register of Wills and that after much search he found it among a lot of loose papers which were piled together in an empty fireplace, where the original papers of that office were then kept.

There was also read in evidence the deed from Adelaide Wilson to Leonard Huyck under which the defendant claimed, the said deed being in the words and figures following:

This indenture, made this eighth day of March, in the year of our Lord, one thousand eight hundred and sixty-five by and between Adelaide Wilson of the City of Washington, in the District of Columbia, of the one part and Leonard Huyck of the same City and District of the other part:

Whereas, John H. A. Wilson of the County of Washington,
15 in the District of Columbia, by his last will and testament bearing date on the — day of October, A. D. 1857, gave devised and bequeathed unto the said Adelaide Wilson his wife all the real and personal property of which he might die seized and possessed in and upon trusts for certain uses and purposes therein set forth and constituting and appointing the said Adelaide Wilson and Thomas O. Wilson Executrix and executor thereof, and

Whereas, the said Executrix and Executor were by the terms of said will duly authorized and empowered to sell and dispose of any part or portion of said estate in manner and form as to them should seem meet and for the best interest of the wife and children of the said testator and in fact to exercise a sound discretion in the management, disposition and investment of the said estate for said purposes, viz., for the benefit of the wife and children of said testator; and in the event of any sale of said estate or any part or portion thereof to convey by a good and sufficient deed all the right, title, interest and estate of the said John H. A. Wilson of, in and to the same, to the purchaser or purchasers thereof, and

Whereas, the said last will and testament was duly admitted to probate before the Orphans' Court for the District of Columbia on the 20th day of March A. D. 1858 and is of record in said Court. And

Whereas, since the probate thereof, viz. on or about the 21st day of September, A. D. 1858 the said executor Thomas O. Wilson departed this life leaving the said Executrix alone in the discharge of said trusts and empowered to act under said will as sole executrix thereof.

Now, Therefore, This Indenture witnesseth that the said Adelaide

Wilson under and by virtue of the authority vested in her by said will and testament as well as by every other and further power her hereunto enabling in consideration of the premises as well as of the sum of thirty-two hundred and twenty-five ($3225 00) dollars current money of the United States to her in hand paid at and before the ensealing and delivery of these presents by the said Leonard Huyck the receipt whereof she doth hereby acknowledge and herself therewith to be paid hath given, granted, bargained and sold enfeoffed, conveyed, released and confirmed and by these presents doth give, grant, bargain and sell, enfeoff, convey release and confirm unto the said Leonard Huyck his heirs and assigns forever all the right, title, interest, and estate both at law and in equity of which the said John H. A. Wilson died seized and possessed of, in and to all that certain piece or parcel of ground situate, lying and being in the County of Washington, in the District of Columbia and described as follows: beginning at the original corner edge of the Eastern branch and run north fifteen and three-quarter degrees east four perches along the river thence south sixty-three and a half degrees east one hundred and twenty-one perches and sixty-one hundre-ths of a perch to a stone west side of the Eastern Branch Road thence with said road south twenty and a quarter degrees west, twelve perches and thirty-eight hundredths edge of said road thence south forty one degrees west eight perches and
16 thirty-six hundredths of a perch edge of said road, thence south forty-eight degrees west twelve perches edge of said road and north east corner of a wooden bridge across said road thence north fifty-three degrees west four perches and sixteen hundredths of a perch center of branch north eight and three-quarters degrees west ten perches center of branch north sixty-three and three quarter degrees west seven perches and twenty hundredths of a perch center of branch north fifty-seven degrees west five perches center of branch north fifty-five and a quarter degrees and four perches center of branch north thirty-seven and three-quarter degrees west six perches center of branch north forty-five and three quarter degrees west twenty five perches center of branch north seventy-three and a quarter degrees west thirteen perches center of branch north fifty-three degrees west nine perches center of branch north eighty-one degrees west eight perches center of branch, north seventy-three and a half degrees west six perches center of branch north eighty-three degrees west six perches and sixty-eight hundredths of a perch center of branch north sixty-three degrees west three perches and twenty hundredths of a perch center of branch north seventy-eight and a half degrees west nineteen perches to a sycamore tree where branch enters Eastern branch thence by said river in a straight line to the beginning containing 21.0—together with the buildings, improvements, privileges and appurtenances, hereditaments to the same belonging or in any manner appertaining and the remainders, reversions, rents, issues and profits thereof and all the right, title and interest and estate both at law and in equity of her the said Adelaide Wilson of, in and to the same, to have and to hold the said piece or parcel of ground and premises hereinbefore described and set forth

with the appurtenances unto him the said Leonard Huyck, his heirs and assigns forever to his or their sole use and benefit and behoof forever and to and for no other use, intent or purpose whatsoever.

In testimony whereof, the said Adelaide Wilson hath hereunto set her hand and affixed her seal the day and year first hereinbefore written.

ADELAIDE WILSON. [SEAL.]

Signed, sealed and delivered in the presence of
J. F. CALLAN.
JOHN PETTIBONE.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, John F. Callan, a Notary Public in and for the County and District aforesaid, duly appointed, do hereby certify that Adelaide Wilson party grantor to a certain deed bearing date on the 8th day of March in the year of our Lord one thousand eight hundred and sixty-five and hereto annexed appeared in person before me in the County and District aforesaid, the said Adelaide Wilson being to me personally well known as being the person who executed the said deed and acknowledge- the same to be her act and deed for the purposes therein expressed.

17 Given under my hand and notarial seal at the City of Washington, D. C., this 8th day of March A. D. 1865.

[SEAL.] JOHN F. CALLAN,
Notary Public.

Thereupon defendant by his counsel announced his case closed and each party moved the Court to direct a verdict in their favor upon the whole evidence, both of which motions were refused, to which counsel respectively excepted and the exceptions were then and there noted by the Justice presiding upon his minutes. Thereupon the Trial Justice announced that he would charge as his conclusion as a matter of law, that the power of sale in said will contained, survived to Adelaide Wilson in her capacity as executrix but only in said capacity and that he would submit the case to the jury for them to find from the evidence whether or not said Adelaide Wilson ever qualified as executrix.

Thereupon counsel for the plaintiffs offered the following prayers:

1. The jury are instructed to find a verdict for the plaintiff on the whole evidence which instruction the Court refused to give, and the plaintiffs thereupon excepted.

2. The jury are instructed that there is no evidence from which they can find that either the executrix or executor ever qualified; which instruction the Court refused to give, and the plaintiffs thereupon excepted.

3. The jury is instructed that the burden is on the defendant to show that the executor qualified, which instruction the Court refused to give, and the plaintiffs thereupon excepted. And thereupon the case was argued to the jury by counsel for plaintiffs and defendants

and in the course of said argument counsel for the defendant referred to the recitals contained in the deed from Adelaide Wilson to Leonard Huyck and stated to the jury that the recitals in said deed were evidence of the fact that she had qualified as executrix, that under the law an executrix could not act as such until she had qualified, that the statement in the deed that Adelaide Wilson was Executrix and was acting as such was equivalent to a declaration by her that she had qualified; that the plaintiffs had stood by in silence during all the years that their mother lived, while innocent persons were successively purchasing the land, in good faith and that it was only after her death, when she could no longer testify as to the fact, that the plaintiffs first gave notice of their claim, and that they, the jury, should find as a fact, from the recitals in said deed, and from the further fact that so many persons had accepted the title, contemporaneously with or within a few years after the conveyance by Adelaide Wilson as executrix, presumptively, after competent title examination and when the fact of her qualification, or her failure to qualify, was easily ascertainable that the said Adelaide Wilson had qualified, and thereupon counsel for the plaintiffs prayed the Court to instruct the jury as follows:

The jury are instructed that the recitals in the deed of Mrs. Wilson to Huyck are not evidence against these plaintiffs of any of
18 the facts therein recited, said deed being in evidence solely, for the purpose of establishing a link in the chain of defendants' title, which the Court refused to do, and the plaintiffs duly excepted, and thereupon the Court instructed the jury in substance as follows: viz.,

That the power of sale contained in the Will of John H. A. Wilson survived to the surviving executrix named in the Will, but that the valid exercise of the power by her depended upon whether or not she had qualified as Executrix and that a question necessary for the jury to determine was whether or not she had so qualified; that the burden of proof was upon the defendant to show this; that a de facto officer was one who had actually taken up and was engaged in the performance and discharge of the duties of an office; that if a jury found a certain person to be a de facto officer they might, if they saw fit, in the absence or proof of the contrary, consider this as evidence tending to show that the person had legally qualified for the office and that in the case at bar if the jury found from the evidence that Adelaide Wilson had as a matter of fact assumed the duties of Executrix under the Will and was in fact engaged in discharging them, they might if they saw fit in the absence of proof to the contrary regard this as evidence which tended to show that she had been legally qualified and installed in the office of Executrix, to which instruction the plaintiffs then and there duly excepted.

Be it further remembered that each of the separate and several exceptions taken by counsel for plaintiffs to the rulings of the Court during the progress of said trial and each of the exceptions taken by counsel for plaintiffs to the instruction of the Court to the jury upon the whole evidence, were taken by the counsel for the plaintiffs

then and there before the jury had retired separately and severally and duly noted upon the minutes of the Justice presiding at the trial and counsel for plaintiffs then and there prayed the Court to sign and seal this Bill of Exceptions and to have the same in force and effect as if each of the said exceptions were severally and separately set forth in said Bill of Exceptions, and at the request of said counsel for plaintiffs the same is recorded signed, sealed and made a part of the record in this cause this 7 day of January, 1910.

[SEAL.] DAN THEW WRIGHT, *Justice.*

Settled by consent,
PENNEBAKER, CARUSI & JONES,
Att'ys for Plaintiffs.
J. J. DARLINGTON,
Of Counsel for Defendant.

19 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Jan. 10, 1910.

In the Supreme Court of the District of Columbia the 10th Day of January, 1910.

At Law. No. 48887.

MARY E. WILSON et al.
vs.
CHESTER A. SNOW.

The Clerk of said Court will please prepare transcript of record on appeal and include therein the following: Declaration filed Oct. 23 1906; Pleas filed Dec. 11. Amended Decl. filed Dec. 17, 1906; Pleas to amended Decl. filed Dec. 27, 1906; Motion & Order of April 2, 1907 for leave to amend Decl.; Memo. of Verdict; Judgment-appeal; deposit in lieu of bond; Bill of exceptions submitted Nov. 12, 1909; Extension of time Dec. 3. Bill of exceptions signed Jan. 7, 1910 & order Jan. 10 extending time to Jan. 25, 1910 & this designation.

PENNEBAKER, CARUSI & JONES,
Attorney- for Plaintiff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48887 at Law, wherein

Mary Eleanor Wilson, et als. are Plaintiffs and Chester A. Snow is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of January, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2110. Mary Eleanor Wilson et al., appellants, vs. Chester A. Snow. Court of Appeals, District of Columbia. Filed Jan. 24, 1910. Henry W. Hodges, clerk.

20 No. 2110.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS Wilson, John Aquila Brown, Adelaide Bury Brown, Appellants,

vs.

CHESTER A. SNOW.

WEDNESDAY, *October 12th, A. D.* 1910.

The argument in the above entitled cause was commenced by Mr. E. A. Jones, attorney for the appellants, and was continued by Messrs. J. J. Darlington and C. A. Douglas, attorneys for the appellees, and was concluded by Mr. C. F. Carusi, attorney for the appellants.

21 No. 2110.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS Wilson, John Aquila Brown, Adelaide Bury Brown, Appellants,

vs.

CHESTER A. SNOW.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This is an appeal from a judgment in an action of ejectment begun by the appellants as heirs at law of John H. A. Wilson, against Chester A. Snow, who holds under a conveyance by the surviving executor of said Wilson, to recover a tract of land in the District of Columbia.

It appears from the agreed statement of facts that the plaintiffs are the children of John H. A. Wilson, who was seized of the land and died testate, February 28, 1858. He was survived by his widow, Adelaide, and the children aforesaid. His will, executed October, 1857, contains the following clauses:

"I give and devise to my dearly beloved wife, Adelaide Wilson all my real and personal property during her single life, for the education and support of herself and my children hereinafter named, and in case of the marriage of my said wife, then she shall
22 forfeit all claim, interest, and estate hereby devised to her, except what is allowed by law, to a widow, and in case of the death or marriage of my said wife, then and in either event, I devise and bequeath all my estate real and personal to my affectionate brother Thomas O. Wilson, in trust for the use and benefit of my dear children, Mary Ellen Wilson, William Harris Wilson, Adelaide Berry Wilson, John Aquila Wilson, and Amelia Maria Wilson, share and share alike, and authorize and empower my said brother to exercise his own judgment and prudence in the discharge of the duties hereby confided to him,—and it is my wish and desire that my executrix and executor hereinafter named shall and may at any time they shall deem best and to the advantage of my said wife and children, sell and convey any part or all of my real and personal estate, and invest the proceeds in good stocks or otherwise, as they may consider best, for the benefit of my said wife and children; in fact, to exercise a sound discretion in the management, disposition and investment of my said estate for the purpose aforesaid, to wit for my wife and children. It is my wish and desire that in the event of its being necessary to dispose of my servants, that they are not to be carried out of the District of Columbia, unless their conduct merits a different disposition to *me* made of them or either of them—and under no circumstances is my servant man Charles to be ill treated, unless his conduct merits it, but so long as he proves faithful as he has heretofore done, he is to meet with good treatment from my executrix and executor and to be properly taken care of by them."

By the last clause he appoints his wife, Adelaide, and his brother, Thomas O. Wilson, executors. It was also agreed that the will was duly executed and probated, and that Thomas O. Wilson died September 21, 1858. There was no record evidence that either of the executors had qualified and received letters testamentary. There was testimony tending to show that the probate records had been negligently kept and cared for between the years 1854 and 1861. No records could be found for that period. The bond book for that period, in which the bond of these executors, if given, ought to be recorded, as well as all estate accounts, are missing from the files.

The deed from Adelaide Wilson conveying the land in question to Leonard Huyck, dated March 8, 1865, contains the following recitals:

"Whereas, John H. A. Wilson, of the County of Washington, in the District of Columbia, by his last will and testament bearing date on the — day of October, A. D. 1857, gave, devised and bequeathed unto the said Adelaide Wilson, his wife, all the real and personal property of which he might die seized and possessed in and upon trusts for certain uses and purposes therein set forth and constituting and appointing the said Adelaide Wilson and Thomas O. Wilson, executrix and executor thereof, and

"Whereas, the said executrix and executor were by the terms of said will duly authorized and empowered to sell and dispose of any

part or portion of said estate in manner and form as to them should seem meet and for the best interests of the wife and children of the said testator and in fact to exercise a sound discretion in the management, disposition and investment of the said estate for said purposes, viz., for the benefit of the wife and children of said testator; and in the event of any sale of said estate or any part or portion thereof to convey by a good and sufficient deed all the right, title, interest and estate of the said John H. Wilson, of, in and to the same, to the purchaser or purchasers thereof; and

"Whereas, the said last will and testament was duly admitted to probate before the Orphans' Court for the District of Columbia on the 20th day of March, A. D. 1858, and is of record in said court; and

"Whereas, since the probate thereof, viz., on or about the 21st day of September, A. D. 1858, the said executor, Thomas O. Wilson, departed this life leaving the said executrix alone in the discharge of said trusts and empowered to act under said will as sole executrix thereof."

This deed acknowledged the receipt of the purchase money $3,225 and conveys the land to the grantee in fee simple. It was duly recorded. It was agreed that defendant Snow, held by regular chain of conveyances, duly recorded, from Huyck. Adelaide Wilson died March 28, 1906. The children of testator, at the time of his decease, were respectively aged 10, 8, 5 years and 1 year. The widow and children lived on the farm at the death of the testator and until the sale aforesaid. The testator owned no other real property.

The plaintiff moved the court to instruct the jury: 1. To return a verdict for plaintiffs. 2. That there is no evidence from which they can find that either the executor or executrix ever qualified as such. 3. That the burden is on the defendant to show the qualification of the executrix; and that the recitals in the deed from Adelaide Wilson to Huyck are not evidence of the facts therein contained, the said deed being solely for the purpose of establishing a link in the chain of defendant's title. These were severally refused and exceptions noted. The court then charged the jury to the effect, that the power of sale contained in the will survived to the executrix, Adelaide Wilson; that the valid exercise of the power depended upon whether or not she had qualified as executrix; that it was necessary for the jury to find that she had so qualified, the burden being — the defendant to prove the same; that a de facto officer was one who had actually taken up and was engaged in the discharge of the duties of an office, and that if the jury found a certain person to be a de facto officer, they might, if they saw fit, in the absence of proof to the contrary, consider this evidence tending to show that the person had legally qualified; and that if the jury found from the evidence that Adelaide Wilson had in fact assumed the duties of executrix and was engaged in discharging them, they might if they saw fit in the absence of proof to the contrary regard this as evidence which tended to show that she had been legally qualified and installed in the office of executrix. To this charge the plaintiffs took an exception. The jury returned a verdict for the defendant, from the judgment following which the plaintiffs have appealed.

1. The first question to be determined is: Did the court err in submitting to the jury the recitals in the deed from Adelaide Wilson, that she was surviving executrix, as evidence from which they might find that she had qualified as executrix of the will of testator? This deed was more than fifty years old. There was evidence showing the loss of records in which the entries relating to the qualification
23 and bonds, etc., of executors ought to have been made. The executrix was dead, and the plaintiffs had been living in the District during the entire period between the death of the testator and the beginning of their action. Under these circumstances we think there was no error. Gray v. Gardiner, 3 Mass., 399-402; Baeler v. Jennings, 40 Fed., 199-216; Willetts v. Mandelbaum, 28 Mich., 521; Doolittle v. Holten 28 Vt., 819-823; Tucker v. Murphy, 66 Texas, 355-359; White v. Jones, 67 Texas, 638-641; see Taylor v. Benham, 5 How., at page 272.

Although the point was not made on the argument, it may be well questioned if any qualification of the executors, assuming that they were made trustees of the land by the will, was necessary or could have been required by the Probate Court. Qualification as executors was undoubtedly necessary as regards the personal estate. But no probate of the will as to real estate was then authorized. It would seem, then, as to the land, that the executors were like any other trustees, whose acceptance of the trust was all that was necessary; and this acceptance may be established by the recital in a deed in execution of the trust.

2. The question upon which the case turns is whether the power of sale given in the will to the two executors, Adelaide Wilson and Thomas O. Wilson, survived the death of the latter. It is well settled that a naked power of sale, not coupled with an interest, when given to two persons, does not survive the death of any one of them. If there be a discretionary power to sell without any words vesting an interest or creating a trust it is a naked power that does not survive. Peter v. Beverly, 10 Pet., 532-564; Taylor v. Benham, 5 How., 233-268.

It remains to consider whether the testator's will conferred a power of sale, coupled with a trust, that survived the death of one of the executors or trustees.

The widow took a life estate by the will, forfeiting by marriage, but coupled with a trust on behalf of the children, that could have been enforced, if necessary, for their education and support.

In case of her marriage or death the entire estate was to pass to Thomas O. Wilson in trust for the use and benefit of the children, who, at the time of the testator's death, were all infants. Finally a wish is expressed that the estate shall be sold by the executrix and the executor, should they at any time deem it best for the benefit of the wife and children; and they are empowered to exercise a sound discretion in the management, disposition, and investment of the said estate for the wife and children.

This management, disposition, and investment extended to the entire estate, which consisted of personalty and realty, before any sale, as well as to the proceeds of any sale that might be made.

In our opinion, this created a trust in the executors, although they were not named as trustees, and no express words of trust were used. See Pom. Eq. Jur., sec. 1011; Tobias v. Ketchun, 32 N. Y., 319.

This being the case the power of sale survived under the rule stated.

The court did not err, therefore, in charging the jury that the deed of Adelaide Wilson passed the title.

4. It has been further urged in support of the judgment that this is the case of a power given to executors virtute officii, which for that reason, also survived. In view of the conclusion reached as regards the trust, it is unnecessary to determine this point.

For the reason heretofore stated, the judgment will be affirmed with costs.

Affirmed.

24 No. 2110. October Term, 1910.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS Wilson, John Aquila Wilson, Adelaide Bury Brown, Appellants,

vs.

CHESTER A. SNOW.

Appeal from the Supreme Court of the District of Columbia.

TUESDAY, *November 1st, A. D.* 1910.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. CHIEF JUSTICE SHEPARD,
November 1, 1910.

25 No. 2110.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS Wilson, John Aquila Wilson, Adelaide Bury Brown, Appellants,

vs.

CHESTER A. SNOW.

TUESDAY, *November 8th, A. D.* 1910.

On motion of Mr. E. A. Jones, of counsel for the appellants, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Aquila Wilson, Adelaide Bury Brown, Appellants, and Chester A. Snow, Appellee, a manifest error hath happened, to the great damage of the said appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 8th day of November, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

27 (*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Acquila Wilson and Adelaide Bury Brown, as principals, and Massachusetts Bonding and Insurance Company, a corporation of the State of Massachusetts, as surety, are held and firmly bound unto Chester A. Snow in the full and just sum of Three hundred dollars ($300.00) to be paid to the said Chester A. Snow, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of November, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between said Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Aquila Wilson and Adelaide Bury Brown, on the one part and said Chester A.

Snow on the other part a judgment was rendered against the said Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Acquila Wilson and Adelaide Bury Brown and the said Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Acquila Wilson and Adelaide Bury Brown having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Chester A. Snow citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Acquila Wilson and Adelaide Bury Brown shall prosecute said writ of error to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ADELAIDE BURY BROWN, [SEAL.]
MARY ELEANOR WILSON, [SEAL.]
AMELIA MARIA WILSON, [SEAL.]
WILLIAM HARRIS WILSON, [SEAL.]
JOHN ACQUILA WILSON, [SEAL.]
By EUGENE A. JONES, *Att'y in Fact.*
MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By LEE B. MOSHER, *Attorney in Fact.*

[Seal of Massachusetts Bonding and Insurance Co.]

Sealed and delivered in the presence of—
CHARLES F. CARUSI.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2110. Mary Eleanor Wilson, et al., Appellants, vs. Chester A. Snow. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Dec. 5, 1910. Henry W. Hodges, Clerk.

28 UNITED STATES OF AMERICA, *ss:*

To Chester A. Snow, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Aquila Wilson, Adelaide Bury Brown are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in

the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 5th day of December, in the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.

J. J. DARLINGTON,
Counsel for Appellee.

Dec. 5, 1910.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 5, 1910. Henry W. Hodges, Clerk.

29 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 28 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Aquila Wilson, Adelaide Bury Brown, Appellants vs. Chester A. Snow No. 2110, October Term, 1910, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 5th day of December A. D. 1910.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

30 In the Supreme Court of the United States, October Term 1911.

No. 466.

MARY ELEANOR WILSON et al., Appellants,
vs.
CHESTER A. SNOW, Appellee.

Assignment of Errors to Be Made Part of the Record.

1. The Court erred in refusing to direct a verdict in favor of the plaintiffs upon the whole evidence.

The Court erred in so much of its charge to the jury as states that "the power of sale contained in the will of John H. A. Wilson survived in the surviving executrix named in the will."

3. The Court erred in refusing to instruct the jury that "the recitals in the deed of Mrs. Wilson to Huyck are not evidence against these plaintiffs of any of the facts therein recited, said deed being in evidence solely for the purpose of establishing a link in the chain of defendant's title.

4. The Court erred in instructing the jury "that if a jury found a certain person to be a de facto officer, they might, if they saw fit, in the absence of proof to the contrary, consider this as evidence tending to show that the person had legally qualified for the office in the case at bar if the jury found from the evidence that Adelaide Wilson has as a matter of fact assumed the duties of executrix under the will and was in fact engaged in discharging them, they might, if they saw fit, in the absence of proof to the contrary, regard this as evidence which tended to show that she had been legally qualified and installed in the office of executrix.

The Clerk will please file and make part of the record in the above entitled cause.

CHARLES F. CARUSI,
EUGENE A. JONES,
Attorneys for Appellants.

[Endorsed:] 187-12. 22,446.

31 [Endorsed:] File No. 22,446. Supreme Court U. S., October Term, 1911. Term No. 187. Mary Eleanor Wilson et al., Pl'ffs in Error, vs. Chester A. Snow. Assignment of Errors. Filed July 13, 1912.

Endorsed on cover: File No. 22,446. District of Columbia Court of Appeals. Term No. 187. Mary Eleanor Wilson, Amelia Maria Wilson, William Harris Wilson, John Aquila Wilson, and Adelaide Bury Brown, plaintiffs in error, vs. Chester A. Snow. Filed December 14th, 1910. File No. 22,446.

INDEX.

Cases Cited.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 187.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS WILSON, JOHN AQUILA WILSON, ADELAIDE BURY BROWN, PLAINTIFFS IN ERROR,

vs.

CHESTER A. SNOW.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of Case.

On October 23, 1906, the appellants, Mary Eleanor Wilson and her brothers and sisters, children of John H. A. Wilson and his wife Adelaide, brought ejectment in the Supreme Court of the District of Columbia against Chester A. Snow to recover the possession of a tract of land near the Eastern Branch of the Potomac River, in the District of Columbia, claiming title as remaindermen under the will of their father, John H. A. Wilson, after the death of the life tenant, their mother, which occurred on March 28, 1906. Appellants and appellee claim title under a common source,

John H. A. Wilson, who died seized and possessed of the land on February 25, 1858, and under the same muniment of title, to wit, the will of said John H. A. Wilson, the appellants claiming as remaindermen under said will and the appellee claiming under a deed made by their mother Adelaide, the surviving executrix under said will, who, being vested by said will only with a life estate in said land, undertook to convey the estate absolutely and divest the remainders in her children in pretended exercise of a naked power of sale conferred by the will jointly upon the testator's brother and herself, the exercise of which power of sale rested in their personal and individual discretion.

John H. A. Wilson was a farmer owning and cultivating a farm which embraced the property herein claimed, and owning no other property. He died at the age of thirty-eight years, leaving Adelaide, his widow, then twenty-nine years of age, and five little children, the appellants here, then aged respectively ten years, eight years, five years, four years, and one year. He also left an older brother, Thomas O. Wilson, a man of affairs and farmer and mill owner in an adjoining county, whom he appointed co-executor with his wife. By his will, made four months prior to his death, he gave his wife a life estate in his property, forfeitable in the event of her remarriage, with the remainder over on her death or remarriage, to his brother, Thomas O. Wilson, in trust for his children, the appellants; said will contained this further provision,—"and it is my wish and desire that my executrix and executor hereinafter named shall and may at any time they shall deem best and to the advantage of my said wife and children sell and convey any part or all of my real and personal estate, and invest the proceeds in good stocks or otherwise as they may consider best, for the benefit of my said wife and children; in fact, to exercise a sound discretion in the management, disposition, and investment of my said estate for the purpose aforesaid, to wit, for my wife and children" (R., p. 12). The will was probated March 20, 1858, and the brother, Thomas O. Wil-

son, died six months thereafter, leaving the executrix, Adelaide, surviving, who undertook to execute the power alone in 1865, by making a deed in fee to Leonard Huyck, under whom the appellee claims. At the trial the evidence was practically undisputed, the only issue submitted to the jury being whether or not Adelaide Wilson, the surviving executrix, had ever qualified as such (an issue which is immaterial unless the power survived the death of Thomas O. Wilson), which issue was decided in the affirmative. The trial court took the view that the power of sale was annexed to the office of executor and as the office survived the power survived, but that in order to execute the power the surviving executrix must first qualify by giving bond as required by law and said court instructed the jury that they might infer this from the recitals in her deed in which she purported to act as executrix (R., p. 18). There was verdict and judgment for the appellee which was affirmed by the Court of Appeals, that court however placing its decision on the ground that the will created a valid and enforceable trust in favor of the children (R., p. 23), and therefore survived whether the gift of the power was to the office or to the individuals and refused to pass on that question (R., p. 24).

Assignment of Errors.

1. The trial court erred in refusing to direct a verdict in favor of the plaintiffs upon the whole evidence (R., p. 17).

2. The trial court erred in so much of its charge to the jury as states that "the power of sale contained in the will of John H. A. Wilson survived to the surviving executrix named in the will" (R., p. 18).

3. The trial court erred in refusing to instruct the jury that "the recitals in the deed of Mrs. Wilson to Huyck are not evidence against these plaintiffs of any of the facts therein recited, said deed being in evidence solely for the

purpose of establishing a link in the chain of defendant's title" (R., pp. 17, 18).

4. The trial court erred in instructing the jury "that if a jury found a certain person to be a *de facto* officer, they might, if they saw fit, in the absence of proof to the contrary, consider this as evidence tending to show that the person had legally qualified for the office and that in the case at bar if the jury found from the evidence that Adelaide Wilson had as matter of fact assumed the duties of executrix under the will and was in fact engaged in discharging them, they might, if they saw fit, in the absence of proof to the contrary, regard this as evidence which tended to show that she had been legally qualified and installed in the office of executrix" (R., p. 18).

5. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia, and in holding that the power of sale contained in the will of John H. A. Wilson survived the death of Thomas O. Wilson.

6. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia, and in holding that the recitals in the deed from Adelaide Wilson were evidence of her having qualified as executrix.

ARGUMENT.

In the determination of the question whether or not a given power survives that "pole star of construction" the intention of the testator, should first be ascertained. Technical words of survivorship will not permit the will of a testator to be frustrated, any more than their absence will prevent its execution. A manifest intention to repose a personal confidence in A and B will not be defeated because words of survivorship are used in conferring the power, any more than a mandatory direction to do a thing will fail because of the death or refusal of the person appointed to do it. Hence, two general rules on the subject: First. That a power involving the exercise of personal discretion does not survive, and cannot be delegated. Second. That a power mandatory in its character may be exercised either by the donee or by some one appointed in his place.

In ascertaining the intention of the testator in this case it is necessary to consider the circumstances of the testator himself, and the condition of his family and the objects of his bounty at the time of making his will. We find that he was the owner of a farm and no other property; that his family, so far as means of livelihood, business experience, or capacity to care for themselves is concerned, utterly helpless; a prey for the designing, or victims of their own improvidence, between whom and ultimate want and privation stood no protector or adviser. A devise of his entire estate to his wife would have left her a bait for sharks; yet if the construction placed upon the will by the trial court be correct, the testator might just as well have given her his estate outright. That these dangers were present in the mind of the testator when he made his will is best evidenced by the will itself, in which he expressly creates in her a life estate only, and vests in his brother for the use of the children the remainder. Under no circumstances is she to receive more than the income and under all circumstances the children

are to be the ultimate beneficiaries; when it is suggested to him that this would tie up the estate, so that it could not be sold, however beneficial a sale may be, a power of sale is embodied, but not to the wife alone; he has his brother, a man of affairs, experienced in such matters, in whom he feels he can entrust the welfare of his wife and children, and so he says in one part of the will I "authorize and empower my brother to exercise his own judgment and prudence in the discharge of the duties hereby confided to him," and further on he expresses the wish that his brother and wife, who are nominated as executor and executrix, "exercise a sound discretion in the management, disposition, and investment of my said estate, for the purpose aforesaid, to wit, for *my wife* and children." He never dreamed that his brother would die first, and certainly never intended that his wife should undertake alone the execution of his will. So that in so far as the question of survivorship of the power depends upon the intention of the testator, it is asserted in all confidence that the testator intended a *joint execution* of the power unless the young widow remarried, and in such case a several execution of the power but by the brother alone. The appointment of the older brother as trustee of the children's estate in remainder; his appointment as coexecutor; the forfeiture of the wife's life estate in case of her marriage; the expressions of confidence in his brother shown by the language of the will, all indicate a plain intention on the part of the testator that pending remarriage or death his brother should act in conjunction with the wife and as a check upon her improvidence.

In Smith *vs.* Bell, 6 Peters, 38, Chief Justice Marshall said:

> "The first and great rule in the exposition of wills (to which all other rules must bend) is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law (Doug., 322; 1 Black. Rep., 672). This principle is generally asserted in the construction of every testa-

mentary disposition. It is emphatically the will of the person who makes it, and is defined to be 'the legal declaration of a man's intentions, which he wills to be performed after his death' (2 Black. Com., 499). These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law.

"In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them." * * *

"What feelings, what wishes might be supposed to actuate a husband and a father, having so little to bestow on a wife and child he was about to leave behind him? His affections would prompt him to give something to both. He could not be insensible to the claims of either. But if his property would not, in his opinion, bear immediate division, the only practical mode of accomplishing his object would be to give a present interest to one and a future interest to the other. All his feelings would prompt him to make, as far as was in his power, a comfortable provision for his wife during her life, and for his child after her decease. This he has attempted to do. No principle in our nature would prompt him to give his property to the future husband of his only child. Every consideration, then, suggested by the relation of the parties and the circumstances of the case, comes in aid of that construction which would give effect to the last as well as first clause in the will; which would support the bequest of the remainder to the son, as well as the bequest to the wife. It is not possible to doubt that this was the intention of the testator."

The Court of Appeals decided that the power survived, upon the authority of a single case, Tobias *vs.* Ketchum. 32 N. Y., 329 (R., 24). That case has no application what-

ever to the case at bar; no question as to the *survivorship* of a power was involved, and the powers conferred were *mandatory and not discretionary.* In that case, which was an action to recover dower and mesne profits, the question was whether or not the widow had elected to take under a will which provided for the payment of a part of the income of the estate to her for life, and it was held that she had not. The executors were not clothed with the legal estate, but were charged with the duty of collecting the entire income, paying taxes and insurance, dividing the income between the widow and children, and upon the death of the widow to divide the entire estate among testator's children, and if necessary, for the purpose of division, to sell the lands and make deeds therefor. The court says: "The authority to sell the real estate and execute deeds therefor, as given by the will standing by itself, could confer nothing but a power, *but coupled as it is with the various provisions for leasing, repairing and insuring, with the obligation to give the widow a residence as she may elect, it goes far to show that it was the intention of the testator to vest the fee of the estate in the trustees.*" The court then simply holds that the executors took a fee by implication, and that the receipt of the income by the widow did not bar her dower.

SURVIVORSHIP OF THE POWER.

The cases on this subject may be classified under three separate heads supporting two general propositions and the exceptions thereto. The first general proposition is that **A POWER GIVEN TO TWO OR MORE PERSONS MUST BE EXECUTED BY ALL AND DOES NOT SURVIVE ON THE DEATH OF ONE,** hence

> "if a man by his will directs his executors to sell his land, that is a bare authority without interest, for the land in the meantime descends to the heirs at law,

and being a mere naked authority, if one of the executors dies, the power at common law would not survive." 4 Kent's Com., 320, citing Co. Litt., 112*b*, Sugden on Powers, 159, and approved in Peter *vs.* Beverly, 10 Peters, U. S., 565, wherein that court said: 'A mere direction in a will to the executors to sell lands, without any words vesting in them an interest in the land or creating a trust, will be only a naked power which does not survive.'" * * * *"and the courts have generally applied to the construction of such powers, the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator."*

In Guttman vs. Buckler, 69 Md., 7, the court said:

"A bare power or authority given to two persons cannot in the absence of words of survivorship or language of like import, be exercised by the survivor. Having thus named the persons by whom the power is to be exercised, the law presumes in the absence of language showing a contrary intention that the donor meant a joint execution of the power, and if one of them dies, it cannot be exercised by the survivor."

See also:

Gray *vs.* Lynch, 8 Gill, 403.
Lane *vs.* Debenham, 11 Hare (Eng.), 188.
Peyton *vs.* Bury, 2 P. Wms., 626.
Att'y-Gen. *vs.* Gleg., 1 Atk., 356.
Beassey *vs.* Chalmers, 16 Beav., 231.
Montefiore *vs.* Brown, 7 H. L. Cas., 241.
O'Brien *vs.* Battle, 98 Ga., 766.
Wardwell *vs.* McDowell, 31 Ill., 364.
Robertson *vs.* Gaines, 2 Humph., Tenn., 367.
Marks *vs.* Sarver, 59 Ala., 335.
Kerr *vs.* Verner, 66 Pa. St., 326.
Clinefelter *vs.* Ayres, 16 Ill., 333.
1 Sugden, Powers (3d ed.), 143 Co. Litt., 113*a*.
Coleman *vs.* Connolly, 242 Ill., 574.

SECOND.

The second general proposition is that **A POWER INVOLVING THE EXERCISE OF PERSONAL DISCRETION IN THE DONEE DOES NOT SURVIVE;** hence *In re Bierbaum,* 40 Hun., N. Y., 504, the will provided: "I give and devise to my daughter Elizabeth all of my estate, to be used and enjoyed by her during her natural life, and immediately after her death, I give, bequeath and devise to the children of my said daughter * * * and appoint Dr. W. W. Sprague executor and authorize him to sell my real estate at any time, either at public or private sale." The executor qualified and then died, and application was made for the appointment of a trustee in his place to execute the power of sale. Held, that the application should be denied, as the power of sale was a naked discretionary one which could not be performed by any one other than that selected by the testator.

In Security Co. *vs.* Snow, 70 Conn., 288, the testator gave a share of his estate to his wife in trust to be converted and paid over to a daughter "as my said wife may deem for the interest and welfare of my said daughter," and directed that any portion of the trust property not paid over to the daughter during her life should at her death go to her lawful heirs. Held, that the discretionary powers given to the wife in the discharge of the trust were purely personal and terminated at her death, and that therefore the trust ceased to be susceptible either of complete execution or partial execution in such a way as to satisfy the testator's design.

In Simmons *vs.* McKinlock, 98 Ga., 738, a deed conveyed land to a certain person in trust for a married woman for life, and at her death to her children then living, "with power in the said trustee by and with the written consent of the (life tenant), to sell said property and reinvest the same in other property, subject to the same limitations and

restrictions." Held, that the power thus created conferred upon the trustee a special personal trust which did not pass to a successor.

In Young *vs.* Young, 97 N. C., 132, land was settled on a trustee in trust for A for life, remainder in trust for her children, with a power in the trustee to sell the land whenever, in his opinion, it should be best for the interest of the *cestuis que trustent.* Held, that upon the death of the trustee equity could not decree a sale at the instance of the life tenant and her children, and that a trustee appointed by the court could not execute it. In Bailey *vs.* Burges, 10 R. I., 422, held, that a power of sale and reinvestment in a deed to a trustee, "his heirs and assigns * * * from time to time as and when the trustee shall deem it expedient to sell or mortgage," etc., at his discretion, is a special discretionary power, and does not devolve upon a new trustee appointed by the court.

Beers *vs.* Narramore, 61 Conn., 13.
Hinson *vs.* Williamson, 74 Ala., 180.
Proctor *vs.* Scharpf, 80 Ala., 227.
Hawkins *vs.* Hawkins, 13 B. Mon., Ky., 245.
Tarver *vs.* Haines, 55 Ala., 503.
Towler *vs.* Towler, 142 N. Y., 371.
Tainter *vs.* Clark, 54 Mass., 220.
Larned *vs.* Bridge, 34 Mass., 339.
Greenough *vs.* Welles, 64 Mass., 571.

"As a general rule, where power to act is conferred on two or more, and it is dependent on their judgment whether such act shall be done, the power is a *special confidence in their combined judgments,* and the concurrence of all is necessary to a valid exercise of the power." Cyc., vol. 31, p. 1105, citing over one hundred cases.

"A testator may direct that the same discretionary power which he has given to trustee designated by himself, shall belong to the trustee appointed by the court in case of a vacancy; but if he omits to do so, a discretionary power will be construed to be personal."

Edwards *vs.* Maupin, 18 D. C., 47.

THIRD.

To these two general propositions there are two exceptions—**(a) A POWER COUPLED WITH AN INTEREST OR TRUST WILL SURVIVE; (b) A POWER GIVEN TO EXECUTORS RATIONE OFFICII WILL SURVIVE BECAUSE THE GIFT IS TO THE OFFICE AND NOT TO THE INDIVIDUALS, AND AS THE OFFICE SURVIVES THE POWER SURVIVES.**

Illustrative Cases.

In Peter *vs.* Beverly, 10 Peters, 565, the court says (italics ours):

> "The general principle of the common law, as laid down by Lord Coke (Co. Litt., 1126), and sanctioned by many judicial decisions is, that when the power to several persons is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest it may be executed by the survivor (14 Johns. Rep., 553; 2 Johns. Ch., 19). But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question that a mere direction, in a will to the executors to sell land, without any words vesting in them an interest in the land or creating a trust, will be only a naked power which does not survive. In such cases there is no one who has a right to enforce an execution of the power. But when anything is directed to be done in which third persons are interested, *and who have a right to call on the executors to execute the power,* such power survives. This becomes necessary for the purpose of effecting the object of the power."

In Taylor *vs.* Benham, 5 Howard, U. S., 267, the Supreme court says (italics ours):

"One of the tests on this subject is, that *a naked power to sell may be exercised or not by the executors, and is discretionary;* while an imperative direction to sell and dispose of the proceeds in a certain way, as in this case, is a power coupled with a trust (citing cases). There are some conflicting cases on this subject, but it is not necessary to review them again, it having been so ably performed by Thompson, J., for this court in Peter *vs.* Beverly." * * * "There, as here, it was also contended that if they had the power to sell it was a naked one and could not survive; but the court says if they had another duty to perform under the will with the proceeds it was a power coupled with a trust or an interest and survived. And the only difference is that the subsequent duty to be performed there was the payment of debts, and here it was to pay over the money as legacies, and, of course, after the payment of any existing debts out of it."

In the following cases the power was to executors and survived, but the power was either mandatory in character, coupled with an interest or a trust, or for the purpose of paying debts or legacies.

Terry *vs.* American Board, 53 Vt., 164.
Bartlett *vs.* Sutherland, 24 Miss., 395.
Davis *vs.* Christian, 15 Gratt., 11.
Chanet *vs.* Vellepontaux, 3 McCord, 30.
Fitzgerald *vs.* Standish, 102 Tenn., 383.
Jackson *vs.* Ferris, 15 Johns., 346.
Forbes *vs.* Peacock, 11 Sim., 152.
Robinson *vs.* Allison, 74 Ala., 254.
Gould *vs.* Mather, 104 Mass., 283.
Gaines *vs.* Fender, 82 Mo., 497.
Osgood *vs.* Franklin, 14 Johns., 527.
Simpson *vs.* Simpson, 93 N. C., 373.
O'Rourke *vs.* Sherwin, 156 Pa. St., 285.
Terrell *vs.* McCown, 91 Tex., 231.
Parsons *vs.* Boyd, 20 Ala., 118.
Hannah *vs.* Carrington, 18 Ark., 104.
Smith *vs.* Winn, 27 S. C., 598.
Dick *vs.* Hardy, 48 S. C., 530.

A devise of land to executors to sell is a power coupled with an interest, Co. Litt., 113*a*, but a devise of land to be sold is not.

Dexter *vs.* Sullivan, 34 N. H., 478.
Greggs *vs.* Currier, 36 N. H., 200.

But a devise that land shall be sold (which by itself would create only a naked power) coupled with an injunction to pay debts with the proceeds will give a power coupled with an interest.

Peter *vs.* Beverly, 10 Peters, 532.

A power to sell and divide gives a naked power only.

Den. exd. Elle *vs.* Young, 23 N. J. L., 478.
Hoyt *vs.* Day, 23 Ohio St., 101.

So a devise "all and every part of my estate shall be sold at the discretion of my executors,"

Chambers *vs.* Tulane, 1 Stock., 146;
Wooldridge *vs.* Watkins, 3 Bibb., 349;

and the law is not different, though the executor has in another capacity an interest in the estate, as where he is the devisee of a share of the land subject to the power, or is a tenant in common thereof. Moores *vs.* Moores, 41 N. J. L., 440. Where a power is given to executors by name, either directly or in such form as "to my executors hereinafter named," the power vests in them as donees, whether they prove the will or not, Dominick *vs.* Michael, 4 Sandf., 374, and where the same person is appointed executor and also donee of a power, the fact that he does not qualify as executor will not deprive him of the power, Williams *vs.* Conrad, 30 Barb., 524, and whenever the proceeds of a power of sale given to an executor are not to be applied in the usual manner as assets in the course of the executorial office, the executor takes not *qua executor*, but as donee;

Edgerton *vs.* Conkling, 25 Wend., 230;
Newton *vs.* Bronson, 13 N. Y., 589;

hence he may execute the power before the will is proved;
Bolton *vs.* Jacks, 6 Robt., 166;

or after he has administered and settled his accounts,
Hoffman *vs.* Hoffman, 66 Md., 568;

or he may renounce administration and afterwards execute the power.
Moody's Lessee *vs.* Fulmer, 3 Grant, 17.

FOURTH.

From these general propositions and the exceptions thereto, we ask assent to the following, as the principle governing the determination of this case:

WHERE A POWER TO SELL AND CONVEY IN FEE IS GIVEN TO EXECUTORS NAMED IN A WILL, AND NO WORDS OF SURVIVORSHIP ARE USED, AND THE EXECUTORS ARE NOT CLOTHED WITH THE LEGAL ESTATE OVER WHICH THE POWER RIDES, AND THE SALE IS NOT MANDATORY, BUT RESTS IN THE SOUND DISCRETION OF THE EXECUTORS, AND THE EXERCISE OF THE POWER DOES NOT INVOLVE THE PERFORMANCE OF ANY DUTY ORDINARILY CONNECTED WITH THE OFFICE OF EXECUTOR, OR THE ADMINISTRATION OF THE ESTATE (*e. g.*, the payment of debts and legacies), **THE POWER DOES NOT SURVIVE, BUT IN CASE OF THE DEATH OF ONE OR BOTH, BECOMES EXTINCT AT LAW; AND EQUITY CAN NEITHER AID NOR ENFORCE IT, NOR SUPPLY A TRUSTEE TO EXECUTE IT.**

Under this principle it is essential to an affirmance of the judgment below that this court be satisfied upon the following points:

A. The testator either by express words in his will authorized the survivor to execute the power, or his intention to have the survivor act in case of the death of one is plainly manifested by the will, or

B. An estate in the land was given to the donees of the power, that the power was incident to the estate, and as the estate survived the power survived, or

C. That the power was mandatory, creating a trust which could be enforced, or

D. That the power was given to the executors by reason of their office.

We discuss these points in their order.

A.

No words of survivorship are used in the will. Not only is there no language in the will justifying the inference that he intended the wife to act alone, but the contrary is strongly deducible, from the lack of confidence indicated by the provision for a forfeiture of her life estate in case of her remarriage, the appointment of his brother as trustee for his children, the devise to them of the remainder in the property, the expressions of affection and confidence in his brother and the specific injunction laid upon him to exercise *his own* judgment and freedom in the discharge of the duties confided to him.

In Clark *vs.* Boorman, 18 Wall., 493, the court said:

> "It may well be doubted if any other source of enlightenment in the construction of a will is of as much assistance as the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised, with the testator and with the instrument itself."

In this case it is clearly apparent that the testator did not intend by conferring a power of sale to enlarge the estate of the widow to a fee, and thus enable her to marry again, sell the property, waste the proceeds, divest the remainder in the children and thus defeat every object of the will. The power was given in order to enable a sale to be made during the minority of the children in case it should appear more advantageous to the wife and children to do so, but the wife was not to be the judge of that, the judgment and discretion of the brother was primarily in the mind of the testator.

B.

By the terms of the will, the widow took an estate for life or widowhood only; the children took (under the Statute of Uses, the trust being dry) a vested remainder in fee. (See Young *vs.* Bradley, 101 U. S., 782.) There could not therefore be any survivorship of the estate upon which could be predicated a survival of the power. The power so far as Thomas O. Wilson was concerned was a power "simply collateral," he having no estate at all in the property subject to the power.

Reid *vs.* Gordon, 35 Md., 174, and cases cited, p. 1042, Vol. 31, Cyc.

So far as the estate of the widow is concerned, it has been held in the District of Columbia (Kennedy *vs.* Alexander, 21 App. D. C., 424) that a power to a life tenant to sell and convey in fee certain parts of the estate, for purposes of support and maintenance does not enlarge her estate; so that in this case the existence of the power in her after the death of Thomas O. Wilson cannot be predicated upon any estate she had in the land. See also Smith *vs.* Bell, 6 Peters, 38, *supra.*

To render a power one coupled with an interest, it is essential that the donee have an interest in the subject-mat-

ter of the power; the fact that the donee may have an interest in that which is produced by the exercise of the power does not render it a power coupled with an interest.

Taylor *vs.* Burns, 203 U. S., 120.
Trickey *vs.* Crowe, 204 U. S., 228.
Missouri *vs.* Walker, 125 U. S., 339.
Hall *vs.* Gambrill, 63 U. S. App., 740, and cases cited Vol. 22., Am. & Eng. Encyc., p. 1093.

In the case at bar Thomas O. Wilson, whose right in the power is said to have survived, had no interest either in the life estate or in the remainder, and the widow's interest in the life estate would cease immediately upon the execution of the power.

C.

The power was not mandatory; it was to be exercised

> "at any time they shall deem best and to the advantage of my said wife and children" * * * "and invest the proceeds in good stocks or otherwise, as they may consider best, for the benefit of my said wife and children; in fact to exercise a sound discretion in the management, disposition and investment of my said estate for the purpose aforesaid, to wit, for my wife and children."

A mandatory power is generally held to be a power coupled with a trust, and upon this theory equity will aid its enforcement by recognizing its survivorship in case of joint donees, and the death of one, by appointing a new trustee in case of the death of all, or by enforcing execution by one who refuses to act.

In Fitzgerald *vs.* Wynne, 1 App., 119, this court said:

> "The power is not a discretionary one, but is in its terms and nature imperative upon the trustee, and therefore must be executed. For it is settled doctrine, that where the power is one which it is the duty of the trustee to execute, he becomes a trustee for the execution of the power, and not as one having a discretion, whether he will execute it or not, and this court adopts the principle as to trusts, and will not permit

his refusal, negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit he was clothed with the power."

Here no trust or power in trust was created; at no time could the donees have been called upon to execute the power of sale; its exercise was dependent entirely upon the judgment and discretion of the donees of the power, and could not be controlled or coerced, either by the beneficiaries or by the court. *In fact no trust could arise until there had been an exercise of the power of sale; it was in the discretion of the donees of the power to permit the estates created by the will to remain as they were,* a life estate to the widow, and vested remainder in the children, or to convert the estate into personalty by a sale and hold the proceeds as a trust fund for the wife and children. After the exercise of the power, a trust would have arisen, but not before. The only trust created by the will which could have been enforced was the trust of Thomas O. Wilson, which was only to arise on the death or remarriage of the widow.

> *"Powers as such are not imperative, but leave the execution of the act authorized to the discretion of the donee, and equity will not interfere in case of non-execution."* * * * "On the other hand, a trust is always imperative, and the failure of the trustee to carry out the trust is not allowed to prejudice the *cestui que trust.* Midway between trusts and mere powers stands the class of 'powers implying a trust' or 'powers in trust.' The donee of such a power is in equity regarded as interested and required to execute it, and if he does not discharge this duty, a court of equity will discharge it in his place, even after the death of the donee. Powers implying a trust, therefore, differ from trusts, and partake of the character of mere powers, in that no estate need be vested in the donee or trustee; they differ from mere powers and partake of the nature of trusts in being imperative."
>
> Am. & Eng. Encyc., 2d Ed., vol. 28, p. 902, and cases cited.

Hence when it is said that "a power coupled with a trust survives" (Peters *vs.* Beverly, *supra*) is meant either a mandatory power without interest or estate, or a devise of the estate with a superadded power; in the one case the mandatory character of the power creates by implication, a trust, and as the trust survives the power survives; in the other case, as the estate survives the power superadded thereto survives with it. In the case at bar the power in Thomas O. Wilson was neither coupled with an interest in the estate, nor was it imperative, so that in neither aspect can it be held to have survived.

D.

This brings us to the final point for discussion: Was the power given to the executors by reason of their office as executors? Or was it intended to be personal to them? Did the testator intend that any one who might perform the office of administering and settling his estate, might execute the power, *e. g.*, an administrator *c. t. a.*? It is well settled that when an executor takes a power *ratione officii, virtute officii* or *qua executor,* as it is variously expressed, the power survives because the office survives. So the question is, what is the test by which to determine whether a power to executors is conferred upon them by reason of their office or not? Is mere identity in the donees of the power and the appointees of the office sufficient?

In Terry *vs.* American Board, 53 Vt., 164 this question was considered and the court said (p. 172):

> "the exercise of the power was not at all necessary for closing the settlement of the estate of the testator. The power would serve all the purposes intended by the testator as effectually, if conferred upon others, as when conferred upon the executors. * * * If the power had been exercised by the executors they would have acted as attorneys of the testator, made such by his will, and not in their capacity as executors."

In Evans *vs.* Chew, 71 Penna. St., 47, the court said that a sale merely for the purpose of reinvestment, and not to pay debts, or for distribution under the will, was collateral to the office of executor, and that the donees were in effect testamentary trustees.

In the District of Columbia executors have nothing to do with the real estate, unless the personal estate be insufficient to pay the debts, in which event authority to sell the real estate may be obtained by petition and order of Court (Code D. C., §§ 146-148).

See Ingle *vs.* Jones, 9 Wall., U. S., 486.
Hamilton *vs.* Clarke, 3 Mackey D. C., 428.

In Walters *vs.* Margerum, 60 Penna. St., 42, the court said:

> "No title was acquired by the plaintiff by the deed of the 21st July, 1866, from the adm. *d. b. n. c. t. a.* of George Kappenburger. The executors were authorized to sell if they thought advisable to do so, *not for the purpose of paying debts, but of investing the proceeds in trust for the parties named.*"

The foregoing cases make the solution of the question whether a power is given to the office or to the individual depend upon whether or not its exercise involves a duty ordinarily connected with the office, and many courts have taken this view.

In Farwell's Treatise on Powers, at page 372, the author says:

> "The next rule is also doubtful, but it seems the better opinion that WHERE A POWER IS ANNEXED TO AN OFFICE (*e. g.*; if it be given to executors) ALL PERSONS WHO FILL THE OFFICE CAN EXERCISE THE POWER; BUT IF THE POWER BE GIVEN TO PERSONS NAMED OFFICIALLY (*e. g.*, to my executors A and B) IT IS IN EACH CASE A QUESTION OF INTENTION, WHETHER THE POWER IS GIVEN TO THE PERSON, OR TO THE OFFICE."

In this country the subject has been regulated by statutes in most of the States, providing in substance that upon the death, refusal or inability of one executor, the survivor, or an administrator *c. t. a.* may execute the power, but these statutes have not been construed to authorize such execution where the will showed an intention to repose a personal confidence in the executor named in the will.

Here we have no statute bearing on the subject except the statute of 21 Henry VIII, which applies only to a renunciation by an executor, and not to the death of one (see Alexander's British Statutes, p. 281, note), and the weight of authority in this country supports the rule as stated by Farwell, that in each case it is a question of intention, whether the power is given to the person or to the office.

Illustrative Cases.

Robinson *vs.* Allison, 74 Ala., 254, was ejectment for a house and lot, the plaintiff claiming under a deed from the surviving executor of the will of James B. Robinson. The will contained the following clause: "My youngest child having heretofore attained the age of twenty-one years, I do not desire that my estate, or any part of it, shall be kept together any longer than may be necessary for a convenient and equitable division. I authorize my executrix and executors to sell any part of my estate, directed to be divided amongst my wife and children, if it be found necessary to effect an equitable division, and such sales may be made at either public or private sale, and upon such terms as my executrix and executor may deem most advantageous to the devisees, and legatees thereof; good security being required of the purchasers for all deferred payments, and if lands be sold, liens to be reserved on the lands sold, to be conveyed to the purchaser by my executrix and executors, or such of them as may be in office as such." The testator appointed his wife, his son and his son-in-law executors. Only one of the executors qualified, and he made the sale and the deed, under which the plaintiff claimed, in execution

of the power of sale contained in the will. The Chief Justice affirming a non-suit, says as follows: "1. It is clear that at common law, a naked power given to persons named as executors, to sell lands, or to do any other act, would not survive, nor could it be executed, unless the persons upon whom it was conferred joined in the execution. But, if there was a power of sale coupled with an interest, the power was capable of execution by surviving executors, or by such of them as qualified. Or, if there was a power of sale given to executors "qua executors and not nominatim," and the will did not expressly point to a joint execution, the power could rightfully be exercised by such as qualified, or by the surviving executors. Or, if there was a devise of lands to executors by name, with directions to sell, the descent to the heirs was interrupted, and the freehold passed to the donee, coupling an interest with the power, and it was capable of execution by surviving executors, or by such as accepted the executorial duties and trusts. But a mere devise that executors should sell lands did not interrupt the descent to the heir, nor pass any estate to the executors, it was but a naked power of sale, and the co-operation of all was necessary to satisfy its express terms. 2. To obviate inconveniences which were found to result from the strict rules of the common law on this subject, was the purpose of the statute, which declares that, where a naked power is given by will to executors, the survivor of them or such as may qualify, or an administrator with the will annexed, may execute the power." Code 1876; Section 2218. The statute by its terms, is confined in operation to two classes of cases; the first is a devise of lands to the executors, with directions to sell; and the other is to a naked power of sale. *In determining whether a power is a naked power, incapable of any other than a joint execution, or whether it may be executed by surviving executors, or by the executors qualifying, the intention of the testator, as made, collected from the terms of the will, must control.* In reference to that intent the power is construed with greater or less latitude. Franklin *vs.* Osgood, 2 Johns., C. H., 1. 3. Looking at the whole will, the purposes for which the power of sale

is conferred, the form and language in which it is expressed, the conclusion that the testator intended a discretionary power in the exercise of which there should be the concurrence of the executrix and executors, seems irresistible. There is not an absolute and unqualified devise that there shall be a sale of the land. The sale is to be made only in the event it is "found necessary in order to effect an equitable division;" and it is to be made "publicly or privately, upon such terms as my executrix and executors may deem most advantageous to the devisees and legatees thereof." Whether a necessity for a sale existed, it is manifest is dependent upon the judgment of the executrix and executors, upon their ascertainment and determination of the fact whether without it an equitable division could be effected amongst the legatees and devisees, and if it shall be determined that there shall be a sale, the terms of sale and whether it shall be made publicly or privately is committed to their judgment and discretion. If the sale is upon credit, a lien upon the lands for the payment of the purchase money is to be reserved, and when the purchase money is paid in full the land is "to be conveyed to the purchaser by my executrix and executors, or such of them as may be in office as such." Thus, the testator distinguished between the sale and the conveyance of the land. The sale is to be made by all—by the executrix and executors, but the conveyance may be executed by such of them as may be in office when the time for its making occurs. The rule is clear and indisputable that when a power to sell lands or to do any other act is conferred upon two or more persons, whether by name or as executors and it is dependent upon their judgment or discretion whether the act shall be done or not, the power conferred is a special trust or confidence. Its exercise is a matter for the judgment or discretion of all, and without the concurrence of all the power cannot be exercised.

It is not difficult to conceive that the testator was willing to repose in the executrix, his wife, the executors, his son and his son-in-law, the power to determine whether a sale of lands was necessary to effect a division among his devisees, the mode and terms of

sale, and yet unwilling to entrust so great a power to either of them solely. Their joint and concurring judgment and discretion he may have deemed the best assurance that the power would be justly and wisely exercised, and exercised only in the contingency expressed: That he contemplated the sale should be the joint act, the concurrence of the judgment of all, is apparent, when the last clause of the item of the will conferring the power is read, which distinguishes between the sale and the conveyance, expressly authorizing such executors as were in office to make the conveyance and not conferring upon them power to make the sale."

In Tarver *vs.* Haines, 55 Ala., 503, the action was ejectment, brought by the heirs at law of Benjamin F. Tarver, against certain persons claiming as the grantees under mesne conveyances from B. C. Tarver, as the executor of said Benjamin F. Tarver. The will provided as follows: "I will and direct that all my just debts and funeral expenses be paid out of my estate by my executors herein named as soon after my decease as may be prudent. I nominate and appoint my son, Britton C. Tarver, my daughter, Ellen E. McWhorter, and Dr. A. B. McWhorter, to be my executors, to execute and carry out this my last will and testament, and it is hereby declared to be my will and desire that my said executors be not required to give bond and security for the execution and performance of this will. I will and direct that my estate remaining be kept together for purposes of planting and farming under the usual modes thereof, until my youngest child living shall arrive at the age of twenty-one years, except as herein otherwise provided and directed. If, however, in the opinion of said executors, it shall at any time be thought prudent and advisable to sell my real estate or any part thereof, or to purchase other real estate, then I will and direct that discretion be allowed and exercised by them." The three executors qualified and thereafter Dr. McWhorter and his wife resigned, and thereafter the surviving executor gave bond as executor and conveyed the lands to the defendants.

The Chief Justice in delivering the opinion of the court referred to the common-law rule that a naked

power to two or more persons as executors did not survive, and goes on to say: "There was also another class of powers which were matters of personal confidence in the donee and were not extended beyond the express words and clear intention of the donor. They were, therefore, when conferred on several donees, incapable of execution, unless all unite. Perry on Trusts, Section 496. A class of these were termed discretionary powers, which were not compulsory on the donee, or, if compulsory, the time and manner of execution were committed to his discretion. Hill on Trustees, 731 (Marginal note, page 485). A power resting in personal confidence is incapable of delegation or transmission, and can be exercised only by those to whom it is expressly confided. Hill on Trustees, 736 (Marginal, page 488). Perry on Trusts, Secs. 496 to 500. Mallett *vs.* Smith, 6 Rich. Equity, 12. Painter *vs.* Clark, 13 Metcalf, 220; Woolridge *vs.* Watkins, 3 Bibb., 349. Cole *vs.* Waite, 16 Vesey, 43; Bartlett *vs.* Sutherland, 24 Miss., 395."

A territorial statute remaining of force until the adoption of the code similar to the Act of 21 Henry VIII, Chap. 4, made a partial change of the rules of the common law, by providing that "the sale and conveyance of lands, tenements and hereditaments directed or devised to be sold by any last will or testament shall be made by the executors, or such of them as undertake the execution of the will, if no other person be therein appointed for that purpose, or if the persons so appointed shall refuse to perform the trust, or died before he shall have completed it." The Code has several sections relating to powers and their execution. Some are mere repetitions of the statutory declarations of the common law, as it was well known and understood, while others are introductive of important changes and alterations. The territorial statute to which we have referred is not in terms enacted. Instead, it is declared "when lands [illegible] devised to several executors or a naked power [illegible]en them by will to sell, the survivor or survivors and the acting executor or executors, when any one or more of them resigns or refuses to act, or is removed by a court of competent authority, and also

an administrator with the will annexed, has the same interest in and power over such lands for the purpose of making sale thereof as the executors named in such will might have had." R. C., sec. 1609. This statute, as did the territorial statute, obliterates the common-law distinction as to survivorship and capability of execution between the devise of lands to executors with directions to sell and a naked power of sale. Under its operation each is capable of execution by the surviving or acting executor. The present statute differs from the territorial statute by extending the power to an administrator with the will annexed, who would not otherwise have succeeded to it. If there is a naked power of sale or devise, with directions to sell, for the payment of debts or legacies, which would be the duty of whoever succeeded to the execution of the will; or merely creating the ministerial duty of the conversion of realty into money for a specific purpose, absolute in terms, not involving either as to the time and manner of execution the judgment or discretion of the executors on which the testator may have relied; the statute advances the intention of the testator by avoiding its failure, because of the absence of a donee, to execute it. The consummation of the intent of the testator is the purpose of the statute; it does not propose to circumscribe his power to confer, as matter of personal confidence, on the executors of his choice and nomination, peculiar and extraordinary authority over his estate, real and personal, to be exercised or not at their discretion, and to require the concurrent judgment of all in its exercise. * * * "It has not been supposed by the English courts that the Act of 21 Henry VIII had any operation when the power was a personal trust or confidence reposed in the persons named as executors. Cole *vs.* Waite, 16 Vesey 27; Walter *vs.* Waunde, 19 Vesey, 424; Hibbard *vs.* Lambe, Amb., 309; Down *vs.* Worrall, 1 Myl. and Keene, 561. A statute similar to ours exists in several, probably most, of the States, and we do not find in any of them it has been construed to embrace mere discretionary powers, resting in the personal confidence the testator reposed in the executors." * * * "It must frequently occur that a testator will devise

lands to his executors, with directions to sell, or without making a devise to them, will confer naked power to sell, accompanied with conditions or provisions indicating that the devise is made or the power is conferred, because of the confidence reposed in the executors personally. In such cases we concur with what was said in Anderson *vs.* McGowan, 42 Ala., 285, that the statute 'does not touch a devise to executors when it is evidenced from the will that a personal trust is created.'" * * * "Reading this will, can it be supposed it would be just to the testator or consistent with his intention, to declare that the power he has so generously and trustingly confided to his son, his son-in-law, and daughter, could devolve on an administrator with a will annexed, who might be a stranger to him, or in the course of administration might be the sheriff, a mere ministerial officer, the accident of a popular election, who, if known to the testator, had never commanded his confidence? Yet, if the statute operates vitalizing the sale and conveyance by the acting executors, it would have a like operation on a sale by an administrator with a will annexed. The acting executor was without authority to make the sale and conveyance."

In O'Brien *vs.* Battle, 98 Georgia, 769, the court quoted with approval Chance on Powers, vol. 1, secs. 645 and 646, as follows: "That a power vested in two or more cannot, on the decease of one or more of the donees be executed by the survivors or survivor is perfectly clear; the rule of law is that powers will not in themselves survive. Not, as is observed by Wilmot, Lord Commissioner, in Mansell *vs.* Mansell, that there is anything 'in an authority incompatible with its surviving' (or its being limited to be exercised by a surviving party), but if I say I will trust two, the law will not say I shall trust one. It is a joint confidence; but if it is limited to the survivor it is saying I will trust two as long as they live, and afterwards one of them." "Even as to trusts which in general survive with and accompany the estate or interest to which they are annexed, a contrary intention sometimes may be collected and will prevail."

In Cain *vs.* McCann, 4 Am. Dec., page 384, the will provided "that all my lands shall be sold as

soon as convenient after my decease, either at public or private sale, as in their discretion it may best suit, and I do hereby empower my executors to make good and lawful deeds for the same." The surviving executor sold. Held, that the power did not survive.

In Catton vs. Taylor, 42 Barber's Reports, page 578, the will provided as follows: "First, my real estate shall be sold as soon as possible after my decease, either by private contract or public sale, just as my executors may agree upon; and after payment of my just debts and expenses by the execution of this will. then the remaining money raised by the said sale or contract to be disposed of thus:" etc. The will then makes specific bequests of the proceeds to various members of his family. The court said: "The will merely conferred upon the executors a naked power; it was coupled with no trust or interest, and hence could only be executed by them, and does not survive. The estate vested in the heirs-at-law of Charles Catton at his decease, subject only to be defeated by the execution of the power," citing Williams on Executors, 578, to the following: 'Where the testator devised the rest and residue of his estate to be sold by his executors, and the money arising from such sale, after paying debts, to be equally divided between the widow and children, and appointed the widow and two others executors. Held, that the executors had a naked authority, and that the legal estate descended to the heirs-at-law;" also citing:

Bergen *vs.* Bennett, 1 Caine's Cases in Error, 15, where Kent, J., says: "If a man by his will directs his executors to sell his land, that is but a bare authority without interest, for the land in the meantime descends to the heirs-at-law, who, until the sale would be entitled to the profits and being but a naked authority if one executor dies the power at common law would not survive, but if a man devises his lands to his executors to be sold, then there is a power coupled with an interest, for the executors, in the meantime, take possession of the land and the profits. 4 Kent's Commentaries, 320. A devise that executors shall sell or that the land shall be sold by them gave them but a power; a devise of the land to be sold by the executors confers a power and does not give any

interest. Waldron *vs.* McComb, 1 Hill, 111; Jackson *vs.* Potter, 4 Wend., 672; Jackson *vs.* Schauber, 7 Cowen, 187; Tucker *vs.* Tucker, 5 New York 409."

In Ferre *vs.* The American Board, 53 Vermont, 162, the will provided as follows: "I give and bequeath to my beloved wife all my personal property, to be at her disposal, and also all of my real property, the use of it during her natural life, provided, nevertheless, that if the personal property and the use of the real, be not sufficient for her and the support of my well beloved mother, during their natural lives, in such case I order my executors to sell so much of the land as may be necessary for their support while in this life, and after both are deceased, what may be left of my real property, I give and bequeath to the American Foreign Missionary Society." The will appointed the wife and the testator's brother executors. After the death of the brother the surviving executrix made a deed. Held: 1. That the deed so executed by one of the two executors was void, and that such a power when so given to two or more does not survive and cannot be executed by the survivor in his own behalf or interest. 2. By the devise a life estate in a farm passed to the widow and the reversion to the defendant, subject to be defeated in whole or in part by the execution of the power on the happening of the contingency named. But, it is a strict rather than a directory power, one to be executed only under the exact circumstances and manner prescribed in the will.

In Bartlett *vs.* Sutherland, 24 Miss., 401, the will contained the following clause: "I further will and desire that my executors hereinafter named shall be at liberty at any and all times to sell or dispose of any part of my estate at private sale, if in their judgment it will promote the interests of my estate, and that they shall be at liberty to sell for cash or on credit without any order of court for that purpose; and that they be permitted to compromise or arrange, at their discretion, any lawsuit or debts that may be against me or my estate." Three persons were appointed executors; two of the executors refused to qualify; the remaining executor made a sale of a tract of land belonging to the estate, and the question was

as to the validity of the sale. The court in its opinion cites the common-law rule as to the non-survivorship of naked powers and refers to the act of 21 Henry VIII, and a similar statute then existing in Mississippi, and uses this language: "It is contended by the plaintiff in error that in all cases where the power of sale is given to the executors *'qua executors'* and not *nominatim,'* the power may be exercised by such as qualify, unless the will expressly pointed to a joint execution; Sugden on Powers, 144; that in the present case as the power was to the executors and not the individuals by name, inasmuch as the executors are bound to pay debts, it is a power coupled with an interest, which will justify the executor taking the trust upon himself to act alone, and at any rate the sale is valid by virtue of the statute. While I readily yield my assent to the rule laid down in the authorities cited by counsel, yet my mind has reached a different conclusion. In the opinion of Chancellor Kent in the case of Franklin *vs.* Osgood, 2 John. Chanc. Rep., 21, afterwards affirmed by the Supreme Court, he states the rule to be that "the intention of the testator is much to be regarded in the construction of these powers, and they are to be construed with greater or less latitude in reference to that intent." Applying this rule to the construction of this power our minds are brought to the conclusion that the testator looked to a joint execution of it. It is not, as will be seen on reference to the will, a devise of the land to be sold at all events, but it is a naked power, or authority, to the executors thereinafter named to sell or dispose of any part of the estate at private sale, if in their judgment it will promote the interests of the estate." We take the rule to be clear and indisputable that wherever a power to act is conferred upon two or more and it is dependent upon their judgment whether the act shall be done or not, the power conferred in such case is a special trust of confidence imposed in the judgment of all and without the concurrence of all the power cannot be exercised. Such was the rule established by the Supreme Court of Kentucky in the case of Woolridge's Heirs *vs.* Watkins, 3 Bibb., 349, and we believe it to be the true one. * * * The testator evidently

contemplated an act of judgment and reflection to be exercised by all his executors before this sale should take place, and that confidence was reposed in the whole of the executors, and not in one. We can readily conceive that a testator might be willing to repose a power to sell his real estate at private sale in the joint judgment of all the executors, and he would not be willing to trust so great a power to the discretion or judgment of a single one. Believing this to be the true construction of this will, we think the sale made by the acting executor was void and conferred no title on the purchaser." (In this case it will be observed that there was a statute authorizing the surviving executor to sell.)

In Lane *vs.* Debenhan, 11 Hare, 192, Vice-Chanc. Wood: "No doubt where it is a naked power given to two persons, that will not survive to one of them unless there be express words or a necessary implication upon the whole of the will showing it to be the intention that it should do so, but the ground of that rule is, that where the testator has disposed of his property in one direction, subject to a power in two or more persons, enabling them to divert it in another direction, the property will go as the testator has first directed, unless the persons to whom he has given the power of controlling the disposition exercise that power He, therefore, to whom the testator has given the property, subject to having it taken from him by the exercise of the power, has a right to say that it must be exercised *modo et forma*. It is, therefore, a rule of law that in all cases of powers, the previous estate is not to be defeated, unless the power be exercised in a manner specifically directed."

In Cook *vs.* Platt, 98 N. Y., 35, the executors, with a power of sale were removed at the instance of the beneficiaries and a receiver appointed in their places, with the powers of an administrator *c. t. a.* On motion to compel the receiver to sell, it was held that the receiver had no authority to execute the power.

In Lockwood *vs.* Stradley, 1 Del. Chanc. Rep., page 298, T. C. by will directed that his executors hereinafter named should sell and dispose of all his real and personal estate at such time or times as they or the survivor of them could do it to the best advantage, at

either public or private sale, as they or he might think best in their or his discretion. Held, that no estate passed to the persons named as executors, but that the real estate descended to the heirs at law, that the persons named as executors, having refused to act, an administrator *c. t. a.* has no authority as such to make the sale directed by the will; the direction to sell was a personal confidence in the executors named, and could not be executed by an administrator.

To the same effect see Hale *vs.* Irwin, 2 Ill., 176; Nicoll *vs.* Scott, 99 Ill., 529.

In O'Brien *vs.* Hobson, 3 Marshall, Kentucky, page 380, syl., "A will giving a power to certain persons therein named to sell lands at their discretion is a personal trust, and though the same persons may be named executors, if on their decease the administrator with a will annexed has no power to execute the trust, the power dies with the trustee and cannot be revived."

To the same effect, Naundorff *vs.* Schumann, 41 N. J. Equity, page 14.

The cases on this subject illustrating the tendency of the American courts to solve the question of survivorship by first ascertaining the intention of the testator could be multiplied; but we believe the cases already cited sufficiently manifest it. We deem it proper, however, to call attention to the case of Weimar *vs.* Forth, 43 N. J. Law Rep., p. 1, which is unique in that it is the only modern case deciding that a naked power given to executors is a power to the office and not to the persons named as executors, irrespective of whether the power was one ordinarily connected with the office and irrespective of the question of the intention of the testator. The court in that case found the intention that the power should survive merely from the fact that the power was given to "my executors" not *nominatim*. If there were anything real in such a distinction we would rely upon the case as authority for our contention, for the power here is conferred upon "my executrix and executor *hereinafter named,*" so the power is given *nominatim* and not to whomsoever might hold the office.

THIRD AND FOURTH ASSIGNMENTS OF ERROR.

The Qualification of the Executrix.

The third assignment of error was for the refusal of the trial judge to instruct the jury that the recitals in the deed of Mrs. Wilson were not evidence of any of the facts therein recited as against the plaintiffs. Under the plaintiffs' view of the law applicable to this case the third assignment of error need not be considered, as there was but one contingency in which the qualification of the executrix could be of importance. If the obvious intention of the testator was that the power might be executed by the wife alone, then under all the authorities her qualification was unnecessary, as the power related to real estate over which the probate court had no jurisdiction at that time, and she would have derived the power from the will and not from letters testamentary. So if the intention of the testator was obviously in favor of the joint execution of the power, the qualification of the executrix was immaterial. The only view of the law in which that question becomes material would be one where the executor took the power of sale *ratione officii*, that is to say, because of the relation of the power to the ordinary duties imposed by law upon executors. In this view of the case, which would seek to annex the power to the office, the qualification of the executrix becomes important because unless she held the office and held it *de jure* with the safeguards of bond and accounting which the law throws around a qualified executor, the presumed intention of the testator would be defeated. The statutes relating to the District of Columbia in force at that time prohibited any executor or executrix prior to qualification from dealing with the estate at all, and expressly stated that they were to be considered before qualification as if they had not been named in said will. Section 16, Abert's Compiled Statutes, provides as follows:

"SEC. 16. In case letters testamentary shall be granted to one or more of the executors named in a will, on failure of the rest, no executor or executrix, not named in the said letters, shall in any manner interfere with the administration, or have any greater interest in the estate of the deceased, than if he or she had not been named in the will as executor or executrix; and if letters of administration, with a copy of the will annexed, shall be granted, no executor or executrix therein named shall in any manner interfere further with the administration, or have any greater interest in the estate aforesaid, than if he or she had not been named as aforesaid; and no executor or executrix named in a will, shall, before letters testamentary shall be granted to him or her, have any power to dispose of any part of the estate of the deceased, or to interfere therewith, further than is necessary to collect and preserve the same: provided, nevertheless, that any act of an executor or executrix named in a will, done before obtaining letters testamentary, shall, in case he or she shall afterwards obtain such letters, be as valid and effectual as if the said act had been done after obtaining such letters; and in case of a suit commenced by such executor or executrix, it shall be sufficient to produce the said letters, or a certificate under the seal of the office where they were obtained, that they have been granted to the party at any time before the trial or final hearing on such suit; and in any case whatever where an exhibit of such letters testamentary or of administration would be good or available, a certificate as aforesaid shall also be good and available."

This question having been submitted to the jury, the court rightly instructed the jury that the burden of proof was upon the defendants to show such qualification reliance upon which formed a part of their title. There was absolutely no evidence whatever in the record of the qualification of Mrs. Wilson, except the recital in the deed to Huyck; and if the court will read these recitals it will see that although they are very full, and she is made to mention the probate of the will, she nowhere states that she qualified as executrix

by giving the bond required by law. But apart from this the trial judge erred in submitting an issue to the jury upon which there was absolutely no competent evidence. It is begging the question to instruct the jury that if Mrs. Wilson was *de facto* a qualified executrix they might find from that fact that she was a *de jure* qualified executrix. There was absolutely not a shred of evidence that she was either, or that she had ever done anything as executrix, except make a deed in which she recited, not that she had qualified, but that she had been appointed by a last will and testament to be an executrix.

As stated before, counsel attached no importance to the qualification of the executrix except under the construction of the will which makes a discretionary power of the sale of real estate for reinvestment one of the ordinary duties of an executor; but if, as happened in this case, such an issue is submitted to the jury, it is submitted that the burden of proof has got to be supported by evidence, and that there was none in this case.

The error involved in the court's charge, it is respectfully submitted, is that one may call himself an officer upon one certain occasion, that his so doing is evidence that he was a *de facto* officer, and that it being established that he is a *de facto* officer that is evidence from which a jury may find that he was a *de jure* officer properly qualified under the law. That would be even a stronger case than the present, where Mrs. Wilson nowhere said that she was qualified, but only that she made a deed as executrix under a will, as all parties concede her to have been, and that at a time when the probate court had no jurisdiction whatever over matters of real estate, unless the same was specifically devised for the payment of debts, or in some other matter within the jurisdiction of the probate court.

Before closing this brief counsel deemed it their duty to notice several statements made by the defendants to the jury, and which may, perhaps, be reiterated here to the effect:

> "That the plaintiffs had stood it in silence all the years that their mother lived, while innocent persons were successively purchasing the land in good faith, and that it was only after her death, when she could no longer testify as to the fact, that the plaintiffs first gave notice of their claim." (R., p. 17.)

Of course, the will, which was recorded, was notice to every one that Mrs. Wilson took a life interest under it by its express terms, and that the plaintiffs in this case had a vested remainder in fee simple limited upon their mother's death or remarriage. It is equally apparent that the plaintiffs had no right to the possession of said property until the death of their mother, and that immediately after her death they took steps to secure their inheritance. Moreover this title has already been passed upon in this jurisdiction, in equity cause No. 11354, Gray *vs.* McMahon, involving real estate immediately adjoining the property here in controversy.

In that case the question was whether or not a purchaser at a public sale of the property should be compelled to take the title. Colonel Payne, the auditor of the court, to whom the question of title was referred, said (Auditor's Report, p. 2): "Upon examination of the title, the purchaser contends, as advised by his counsel, the said Adelaide Wilson had no authority to convey any interest in the said property beyond her estate for life or widowhood." This contention was sustained, the auditor reporting that the title was not such as a purchaser should be required to take and recommending a quitclaim deed from the heirs of John H. A. Wilson.

Respectfully submitted,

CHAS. F. CARUSI.
EUGENE A. JONES.

INDEX.

Table of Cases.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 187.

MARY ELEANOR WILSON, AMELIA MARIA WILSON, WILLIAM HARRIS WILSON, JOHN AQUILA WILSON AND ADELAIDE BURY BROWN, *Plaintiffs in Error,*

vs.

CHESTER A. SNOW, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

John H. A. Wilson died February 28, 1858, seized of a tract of land, of which that described in the record was a part, and of no other real estate, leaving him surviving his widow Adelaide Wilson, and as his only heirs at law five children, who are the plaintiffs in error. His last will and testament, duly executed to pass real estate, provided as follows:

"I give and devise unto my dearly beloved wife, Adelaide Wilson, all my real and personal property during her single life, for the education and support of herself and my children hereinafter named, and in case of the marriage of my said wife, then she shall forfeit all claim, interest, and estate hereby devised to her, except what is allowed by law, to a widow, and in case of the death or marriage of my said wife, then and in either event, I devise and bequeath all my estate real and personal to my affectionate brother Thomas O. Wilson, in trust, for the use and benefit of my dear children, Mary Ellen Wilson, William Harris Wilson, Adelaide Berry Wilson, John Acquila Wilson, and Amelia Maria Wilson, share and share alike, and authorize and empower my said brother to exercise his own judgment and prudence in the discharge of the duties hereby confided to him,—and it is my wish and desire that my executrix and executor hereinafter named shall and may at any time they shall deem best and to the advantage of my said wife and children, sell and convey any part or all of my real and personal estate, and invest the proceeds in good stocks or otherwise, as they may consider best, for the benefit of my said wife and children; in fact, to exercise a sound discretion in the management, disposition and investment of my said estate for the purpose aforesaid, to wit, for my wife and children. It is my wish and desire that in the event of its being necessary to dispose of my servants, that they are not to be carried out of the District of Columbia, unless their conduct merits a different disposition to be made of them or either of them—and under no circumstances is my servant man Charles to be ill treated, unless his conduct merits it, but so long as he proves himself faithful as he has heretofore done, he is to meet with good treatment from my executrix and executor and to be properly taken care of by them.

"And lastly, I do hereby constitute and appoint my dear wife, Adelaide Wilson, executrix and my affectionate brother, Thomas O. Wilson, executor of

this my last will and testament, revoking and annulling all former wills by me heretofore made, ratifying and confirming this and none other to be my last will and testament." (R., 12.)

Thomas O. Wilson, one of the executors, died September 21, 1858. On March 8, 1865, Adelaide Wilson, as executrix of the testator and in her own right, conveyed the land in dispute to one Leonard Huyck, by a deed reciting as follows:

"WHEREAS, John H. A. Wilson, of the County of Washington, in the District of Columbia, by his last will and testament bearing date on the —— day of October, A. D. 1857, gave, devised and bequeathed unto the said Adelaide Wilson, his wife, all the real and personal property of which he might die seized and possessed, in and upon trusts for certain uses and purposes therein set forth and constituting and appointing the said Adelaide Wilson and Thomas O. Wilson executrix and executor thereof; and,

"WHEREAS, The said executrix and executor were by the terms of the said will duly authorized and empowered to sell and dispose of any part or portion of the said estate in manner and form as to them should seem meet and for the best interests of the wife and children of the said testator, and in fact to exercise a sound discretion in the management, disposition and investment of the said estate for said purposes, viz., for the benefit of the wife and children of the said testator; and in the event of any sale of said estate or any part or portion thereof to convey by a good and sufficient deed all the right, title, interest and estate of the said John H. Wilson of, in, and to the same, to the purchaser or purchasers thereof; and,

"WHEREAS, the said last will and testament was duly admitted to probate before the Orphans Court

for the District of Columbia on the 20th day of March, A. D. 1858, and is of record in said court; and,

"WHEREAS, Since the probate thereof, viz., on or about the 21st day of September, A. D. 1858, the said executor, Thomas O. Wilson, departed this life leaving the said executrix alone in the discharge of the said trusts, and empowered to act under the said will as a sole executrix thereof."

The deed thereupon acknowledged the receipt of the purchase money, $3,225, and conveyed the land to the grantee in fee simple.

By a succession of conveyances, set out at pp. 10-11 of the Record, the title became vested in the defendant in error, on June 22, 1905. The stipulation, Record, pp. 9-10, shows that the defendant claims under the will and these conveyances, and that possession had been continuous by himself and those under whom he claims. Adelaide Wilson died March 28, 1906, whereupon the plaintiffs in error brought ejectment, claiming that the power of sale given by the will did not survive to the surviving executrix, and, further, that the records of the Probate Court furnished no evidence of her qualification as executrix, and that for these reasons the title of the defendant in error was invalid. There was no claim that the sale was not made in the exercise of a sound discretion, that it had not enured to the benefit of the estate, that the proceeds of the sale had not been administered properly and accounted for to the satisfaction of the beneficiaries, or that there had been any loss, nor was there any offer to return them or any part thereof.

At the trial, the Deputy Register of Wills testified that the only paper he was able to find, among his records, relating to the estate of the testator was the will, itself, with a written endorsement thereon that it had been proved

and filed, and that he had found no entries to indicate that either of the executors had qualified or received letters testamentary. On cross-examination, he testified that the records of his office were defective, that the bond book, *i. e.*, the book in which the bond of these executors would have been recorded if they gave one, was missing for the period between December 30, 1856, and April 28, 1861; that the accounts filed by executors in his office were missing from December 9, 1854, to 1861; that there were no records, of any kind, between 1856 and 1861, and that, if docketed, the entry would appear in the docket, which it does not do, but he does not know whether the fact would be shown by the docket. The evidence on behalf of the defendant in error showed that the records of the Probate Court during the period in question were kept in an exceedingly negligent manner, important and original papers being piled loosely together in an empty fireplace.

The trial court instructed the jury that the power of sale contained [illegible] the will survived to the surviving executrix; that the valid exercise of that power depended upon whether she had qualified as executrix; that the burden of proof upon this issue rested upon the defendant; that a *de facto* officer was one who had actually taken up and engaged in the performance and discharge of the duties of an office; that if the jury found a person to be a *de facto* officer, they might, if they saw fit, in the absence of proof to the contrary, consider this as evidence tending to show that the person was legally qualified for the purpose, and that if they found from the evidence that Adelaide Wilson had, as a matter of fact, assumed the duties of executrix under the will, and had in fact engaged in discharging them, they might, in the absence of proof to the contrary, regard this as evidence tending to show that she had qualified as executrix. To these instructions, apparently as a

whole, the plaintiffs in error excepted (Rec., p. 18). Exception was also taken to the refusal of the court to direct a verdict for the plaintiffs in error, to its refusal to instruct that there was no evidence from which the jury could find that either the executor or executrix had qualified, and to its refusal to instruct that the recitals in the deed from Mrs. Wilson to Huyck were not evidence of the facts which they recited. (Rec., pp. 17-18.)

From the foregoing, it will be seen that the questions in this case are two, namely:

I. Whether there was evidence from which the jury could find that Mrs. Wilson qualified as executrix.

II. Whether the power of sale given by the will survived to the surviving executrix.

I.

The first of these questions, namely, whether there was evidence from which the jury could find that Mrs. Wilson qualified as executrix, it is submitted is wholly immaterial, for the reason that, as the law in the District of Columbia then stood, there was no court which had jurisdiction to grant probate of any testamentary instrument as a will of real estate, or to exact a bond, oath, or other qualification of executors with respect to realty, to grant letters testamentary which would include any powers with respect to real estate, to require, or to receive, accounts with respect thereto, or in any other manner to exercise jurisdiction over or with respect to testamentary dispositions of real estate, or with the duties or powers of executors in that regard. Section 16, Chapter 1, of Abert's Compiled Statutes of the District of Columbia, referred to at pp. 34-35 of the brief for plaintiffs in error, is a section from the chapter on "Administration," and relates entirely to personal estates. This is sufficiently apparent, irrespective of

its context, from the section itself; it provides, simply, that executors who do not qualify shall have, as against those who do, or as against the administrator *c. t. a.* if none of the executors qualify, "no greater interest in the estate than if they had not been named" as executors. The preceding Section 14 provides that, if there shall be more than one executor named in a will "containing any disposition relative to any personal estate," there may be the same proceeding in respect to each as though he were the only executor named; the oath (Section 22) and the letters testamentary to be granted (Section 93) relate only to the "goods, chattels, personal estate and credits" of the testator; while Section 84 expressly forbade any accounting in the Probate Court for the proceeds of land directed by the will to be sold, or the profits thereof. As pointed out by the Court of Appeals in its opinion (Rec., p. 23), not even probate of a will of real estate was authorized by the laws then in force, and there was no law requiring, nor admitting of, the qualification of executors as to real estate.

But, in the second place, if such qualification were necessary, we submit that, especially under the circumstances of this case, there was not only sufficient but ample evidence to go to the jury upon the subject. The records of the Probate Court covering the period of the death of the testator and for three years afterwards are wholly missing, including the bond book, which would have contained the bond given by them as executors, in qualifying for the office. The deed was executed forty-one years before the suit in ejectment was brought, during all of which period there had been continuous possession under it, as admitted by the stipulation appearing at pp. 9-10 of the Record. That the recitals in a deed, under such circumstances, are admissible is confidently submitted upon the authorities

cited in the opinion of the Court of Appeals. (Rec., p. 23.) Neither in the court below, nor here, were any authorities to the contrary cited, or claimed to exist.

At page 37 of the opposing brief, reference is made to an alleged record in an unreported equity cause, in which specific performance of a contract for the purchase of another portion of the land of which this testator died seized and which his surviving executrix had sold and conveyed, was denied except upon terms of first obtaining a quit claim from his heirs. If this reference to the unproven record of an unreported case is available for any purpose, it can be so only as an admission by the plaintiffs in error that, contrary to the contention at page 36 of their brief, Mrs. Adelaide Wilson had acted as a qualified executrix otherwise than in the execution of the deed over which the present controversy arises.

II.

Did the Power Survive?

On behalf of the defendant in error, it is freely conceded that a mere naked power to sell, given to two or more persons, *qua* individuals, must be exercised by all, and terminates with the death of any. On the other hand, as is conceded in the opposing brief (p. 12), a power coupled with a trust, or a power given to executors *qua* executors, does not terminate with the death of any, but survives. The trial court (Rec., p. 18) held, generally, that the power survived. The Court of Appeals held that the will conferred a power of sale coupled with a trust, and therefore survived (Rec., p. 23), rendering it unnecessary to consider the further question whether the power was conferred upon the executors *virtute officii*.

Under the present head of discussion, therefore, the questions are:

(1) Was the power of sale coupled with a trust or interest? and

(2) Was the power of sale conferred upon the executors, as executors?

If either of these questions is to be answered in the affirmative, the trial court properly instructed the jury, and the judgment should be affirmed.

(1)

In the first place, then, was or was not the power of sale conferred by the will, coupled with a trust or an interest? We submit that it was.

Though inartificially drawn, the testator's intent is entirely apparent. He first provides an interest for life or during widowhood, to his widow, for the support of herself and for the support and education of the children, followed by a remainder, at her death or in the case of her marriage, to his brother, Thomas O. Wilson, for the benefit of his five children. But, over and above all these provisions, is his express direction that "my executrix and executor hereinafter named shall and may at any time they shall deem best and to the advantage of my said wife and children, sell and convey any part or all of my real and personal estate, and invest the proceeds in good stocks or otherwise, as they may consider best for the benefit of my said wife and children; in fact, to exercise a sound discretion in the management, disposition and investment of my said estate for the purpose aforesaid, to wit, for my wife and children." Then follows a provision against the sale of his slaves in such manner as would involve their being carried out of the District of Columbia, and a special direction that, under no circumstances, was his servant man Charles to be ill treated so long as he proved himself faithful as he had theretofore done, and that he was "to meet with good treatment from my executrix and executor, and to be properly taken care of by them."

It being elementary that the creation of a trust, and of a title in and to the property to which it attaches, is to be determined by the powers conferred and by the character of the interest or title reasonably necessary to their exercise, irrespective of the phraseology employed in creating the trust, the inquiry here is, what were the executors to do? and what interest in or title to the property was reasonably necessary for performance of the powers given? Those powers were, to sell the whole or any part of the estate, both real and personal, before as well as after termination of the life estate given the wife, to invest the proceeds of such sale or sales in stocks or otherwise as they might consider best, and, in fact, to exercise their sound discretion in the *management, disposition* and *investment* of the estate, for the benefit of the wife and children. Was not this a trust? and was not an interest in or title to the property, itself, reasonably necessary to its performance? It will be observed that they were not only to sell the property, but to manage it, in advance of sale; and in the event of sale to reinvest the proceeds, in stocks or other property. How were they to convey, if they had no title? In whose name were the proceeds of sale to be invested? and for what purposes, other than, purely and simply, in trust for the benefit of the wife and children?

Looking, as courts do, through form to substance, and to the intention of the testator, the purpose and effect of the will is precisely the same as if, in terms, the testator had devised his property, real and personal, to his executors, in trust to permit the wife to enjoy it for the maintenance of herself and the children during her widowhood, with remainder to Thomas O. Wilson for the benefit of the children, but with power and in trust to the executors, at any and all times, to manage it for their best interests, to sell and convey, convert into money, and to invest and reinvest for the benefit of the wife and children, as their sound discre-

tion might direct. As the Court of Appeals points out in its opinion, at p. 23, "This management, disposition and investment extended to the entire estate, which consisted of personalty and realty, before any sale, as well as to the proceeds of any sale that might be made," and created a trust in the executors, although they were not named as trustees, and although no express words of trust were used. If the Court was right in this conclusion, as we submit it was, it is conceded the power survived, and there was no error in the judgment rendered by the trial court.

The opposing brief, at pp. 7-8, objects that the ruling of the Court of Appeals was based upon the authority of a single case, Tobias vs. Ketchum, 32 N. Y., 329, which case the brief contends was without application because no question of survivorship was involved in it, because the powers in that case were mandatory, and because of certain other differences in the facts of the two cases, not essential to be detailed. The case is cited by the Court of Appeals simply for the position that a trust may be created in executors, although they are "not named as trustees, and no express words of trust are used," which proposition it amply sustains. Nor it is quite correct to say that the opinion rests upon this citation only. Section 1011 of Pomeroy's Equity Jurisprudence is also cited, which contains a number of citations to like effect, among which may be instanced the following:

Meeks vs. Briggs, 87 Ia., 610, 617: "It is true that, in terms, the property in the case at bar is not bequeathed or devised to the trustees, nor need it be in order for them to take title. Where trustees are named in a will, the law looks to see what powers are conferred upon them, what duties are required of them, and presumes that it was the testator's intention to give them such an estate as will enable them to execute the powers given and perform the duties required. Webster vs. Cooper, 14 How., 499. And

it has been held that, though no trust is declared in express terms, nor even mentioned, still the intention of the donor to create the trust, and the existence of the trust itself, will be necessarily inferred from the powers and authority given the grantee; and, in case of wills, even where no estate is directly devised to the executors, but the whole estate is apparently given to the beneficiaries, the trust may be necessarily inferred from the power and authority conferred upon the executors and thus from a construction of the entire will the intention may be shown that the executors are to take the legal title as trustees of an express active trust."

Arlington State Bank vs. Paulsen, *et al.*, 57 Neb., 717, 729-30: A will directed the executors to pay the testator's debts out of his personal estate, and, if that proved insufficient, to sell and convey any of his real estate for the purpose, and, also, to sell and convey any or all the real estate and pay the proceeds in certain proportions to certain heirs; *Held,* that the legal title to the real estate vested in the executors, immediately upon the testator's death.

Ward vs. Ward, 105 N. Y., 68, 74: Where the will gave the executors authority, in their discretion, to change the investment of the testator's property and invest the proceeds in certain designated classes of securities, practically as in the case at bar, the court said: "The executors may not only invest, but re-invest, and in whose name, if not their own, shall the government, State, or city securities be registered? They may also sell any part of the estate as in their judgment may become necessary—they are to divide, therefore they are to receive, the income. By these incidents, the case seems to be brought within the rule that when the duties imposed are active, and render the possession of the estate convenient and reasonably necessary, the executors will be deemed trustees for the performance of their duties to the same extent as though declared to be so by the most explicit language."

Toronto General Trust Co. vs. C. B. & Q. R. R. Co., 123 N. Y., 37: A codicil gave the wife the income from the estate, real and personal, for her natural life, and on her death to the children, "the real and personal estate to be realized by my trustee, either at public or private sale," at his discretion, as by him deemed best for the interest of the estate at the death of the wife, and divided among the issue of the marriage. *Held*, that the codicil created a valid trust, and, although there were no words of gift to the trustee, he took the legal title to the trust estate, on the authority of a number of English and American cases cited, among which was Tobias vs. Ketchum, cited in the opinion of the Court of Appeals.

All the foregoing cases are cited, in addition to Tobias vs. Ketchum, in Section 1011 Pom. Eq. Jur., referred to in the opinion of the Court of Appeals in support of its conclusion that the will in controversy created a trust, notwithstanding the fact that the executors were not named as trustees, and that no express words of trust were used. Many other authorities exist, to the same effect.

The leading case on the subject in the United States is *Peter vs. Beverly*, 10 Pet., 532. Here the testator, David Peter, of the District of Columbia, devised all his property to his wife for the maintenance and education of his children. He provided for the payment of debts by the following clause of the will:

> "I wish all my debts to be as speedily paid as possible, for which purpose I desire that the tract of land on which Dulin lives, together with all the personal property thereon may be sold and applied to the purpose. And in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object."

He appointed his wife, his brother, George Peter, and his wife's brother, Leonard H. Johns, executors. All the executors qualified. George Peter survived the other executors, and, finding it necessary for the payment of debts, he was about to sell some of the real estate, consisting of lots in the city of Washington, when a bill was filed by the heirs, contending, among other things, that the power to sell the real estate did not survive to the surviving executor. The court held that the direction in the will of David Peter to sell a portion of the real estate created a power coupled with an interest or trust, which survived, and that the surviving executor was by necessary implication the person authorized to execute the power and fulfill the trust. The court, in that part of its opinion relating to the survival of the power, at page 564, says:

> "There is ample power in the surviving executor to sell. We find in the cases decided in the English courts and in the elementary treatises on the subject, no little confusion and many new distinctions.
>
> "The general principle of the common law, as laid down by Lord Coke (Co. Lit., 112, *b*) and sanctioned by many judicial decisions, is that when the power given to several persons, is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest, it may be executed by the survivor (14 Johns. Rep., 553; 2 Johns. Ch., 19).
>
> "But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction, in a will, to the executors to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when anything is directed to be done in which

third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in executors because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian or other trustee, is invested with the rents, and profits of land, for the sale or use of another, it is still an authority coupled with an interest, and survives (1 Caine's Ca. in Er., 16; 2 Peere Wms.).

"In the American cases there seems to be less confusion and nicety on this point, and the courts have generally applied to the construction of such powers the great and leading principle which applies to the construction of other parts of the will to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will warranting the conclusion that the testator intended, for safety or some other object, a joint execution of the power, as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power; and where there is a trust, charged upon the executors in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted in any event to fail for want of a trustee. This is the doctrine of Chancellor Kent in the case of Franklin vs. Osgood (2 Johns. Ch., 19), and cases there cited, and

is in accordance with numerous decisions in the English courts (3 Atk., 714; 2 Peere Wms., 102). It is adopted and sanctioned by the Court of Errors in New York, on appeal, in the case of Franklin vs. Osgood. And Mr. Justice Platt in that case refers to a class of cases in the English courts, where it is held that although, from the terms made use of in creating the power, detached from the other parts of the will, it might be considered a mere naked power to sell, yet, if from its connections with other provisions in the will it clearly appears to have been the intention of the testator that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the Supreme Court of Pennsylvania in the case of The Lessee of Zebach vs. Smith (3 Binney, 69). The court there considered it as a settled point that if the authority to sell is given to executors, *virtute officii*, a surviving executor may sell; and that the authority given by the will in that case to the executors to sell, was to them in their character of executors, and for the purpose of paying debts, an object which is highly favored in law.

"Although the clause in the will now under consideration does not name the executors as the persons who are to sell the land, yet it is a power vested in them by necessary implication. The land is to be sold for the purpose of paying the debts, which is a duty devolving upon the executors; and it follows, as a matter of course, that the testator intended his executors should make the sale to enable them to discharge the duty and trust of paying the debts. Mr. Sugden, in his Treatise on Powers (page 167), on the authority of a case cited from the year books, lays it down as a general rule that when a testator directs his land to be sold for certain purposes, without declaring by whom the sale shall be made, if the fund is to be distributed by the executors, they shall have, by implication, the power to sell. And this is the doctrine of Chancellor Kent in the case of Davoux

vs. Fanning (2 Johns. Ch., 254). The will, in that case, as in this, directed the real estate to be sold for certain purposes therein specified but did not direct expressly by whom the sale should be made; and he held, as Lord Harwicke did in a case somewhat similar (1 Atk., 420), that it was a reasonable construction that the power was given to the executors, that it was almost impossible to mistake the testator's meaning on that point. So, in the present case, it is impossible to draw any other conclusion than that it was the testator's intention that the sale should be made by his executors. Jackson vs. Hewitt (15 Johns., 349) is a case very much in point on both questions. That the power in this case is coupled with an interest, and survives and that by implication, it is to be executed by the surviving executor. The testator, say the court in this case, directed that in case of a deficiency of his personal estate to pay his debts, some of his real estate should be sold, without naming by whom; and one of the executors, only, undertook the execution of the will, and sold the land, and the court held that this was a power coupled with an interest, and might be executed by one of the executors, it being a power to sell for the payment of debts."

In the case last cited, as noted by the court in its opinion, the will did not name the executors as the persons who were to sell the land; in the case at bar, it was "my executrix and executor" who were to "sell and convey any part or all of my real and personal estate, invest the proceeds in good stocks or otherwise as they may consider best for the benefit of my said wife and children," etc., etc.

To the objection that the provision in Peter vs. Beverly was for a specific duty, the payment of debts, we submit that the direction to pay debts no more created a trust, to be performed by the the executors, than the direction addressed to the executors by the will of John H. A. Wilson "to exercise a sound discretion in the *management, dispo-*

sition and *investment* of my said estate, for the purpose aforesaid, to wit, for my wife and children,"—following, as that direction does, an express authority for the sale and conveyance of any or all of his real and personal estate, and reinvestment of its proceeds in stocks and otherwise. But that the trust need not be mandatory is shown *infra*.

The question was again considered by this court in the case of *Taylor vs. Benham*, 5 How., 233, and *Peter vs. Beverly* was approved and followed.

The facts of the case are voluminous and complex, but those bearing upon this question are briefly as follows: The testator, W. F. Taylor, was seized at his death of certain real property in Kentucky which he held in trust for the heirs of William Forbes. Upon his death he devised, by a residuary clause, the lands and trusts to his brother and sister. He also directed that "all of my property that I may die seized and possessed of or in any wise belonging to me, be sold." He appointed four executors, of whom Samuel Savage was the surviving executor, and conveyed the lands, and it became necessary to determine whether Savage had power as the surviving executor to sell the land. The court held that the testator intended to empower the executors by the clause quoted above to sell the land he, the testator, held in trust as well as that in fee; that the executors were thus invested with a power to sell coupled with a trust, and hence a surviving executor could sell, and that the residuary legatees under the will of W. F. Taylor became trustees to the heirs of Wm. Forbes.

The court said:

> "If Wm. F. Taylor, when making his will, supposed that he, as trustee of this land, could direct the proceeds to be paid over to others than the heirs of Wm. or Nathaniel F., the devise would none the less show his intent to pass to the executors a power to

sell coupled with a trust; and they would none the less take it coupled with a trust. Indeed, if it was necessary, in a case like this, to carry into effect the leading object of the testator in the will, to consider him as granting to the executors a power coupled with an interest, rather than one coupled with a trust, it would not be difficult to sustain such a construction in a court of equity, as we have before intimated. Courts, in carrying out the wishes of testators, the pole star in wills, are much inclined, especially in equity, to vest all the power or interest in executors which are necessary to effectuate those wishes, if the language can fairly admit it (4 Kent's Com., 304, 319; 10 Peters, 533; Schauber vs. Jackson, 2 Wend., 34; Bradstreet vs. Clarke, 12 *Ibid.*, 663; Bloomer vs. Waldron, 3 Hill, 365; Oates vs. Cooke, 3 Burr., 1684; Jackson vs. Martin, 18 Johns., 31; 1 Ves. Sen., 485; Coster vs. Lorillard, 14 Wend., 299). They are inclined also when considering it a trust, or a power coupled with an interest, to have its duration and quantity commensurate with the object to be accomplished (Shelly vs. Edelin, 4 Adol. & El., 585; White vs. Simpson, 5 East., 164; 1 Barn. & Cress, 342; 5 Taunt., 385). Though the distinctions between these different powers are not always well preserved, no doubt exists that a power coupled with an interest may be inferred by obvious implication from the whole will, as the fee not being at once vested elsewhere, and it being necessary to have it in the executors to effect the general desire (Jackson vs. Schauber, 2 Wend., 1, 54, 55, overruling S. C., 7 Cowen 193) as well as the usual course which is by an express devise to the executors (Bradstreet vs. Clarke 12 Wend., 665, 667). Nor is it of any consequence how small the interest be (Osgood vs. Franklin, 2 Johns. Ch., 20; Bergen vs. Bennett, 1 Caines' Cas. in Err., 16; 2 P. Wms., 102). *It is enough if only to distribute the proceeds as here, or to take the rents or use for the benefit of others* (same cases and 14 Johns., 555; Zebach vs. Smith, 3 Binney, 69). The interest, too, may be equitable or legal (Hearle vs. Greenbank, 3 Atk., 714; 2 Johns. Ch., 20).

> And it is an interest not required to yield a profit or gain, but any title in the estate itself, the thing to be sold. * * * Now it appears that Savage, in his deeds of this land, averred himself to be the surviving executor of Taylor's will, and the case discloses the death of two of them, but says nothing of the other, except, in 1824 and 1825, he is referred to as dead 'some time ago.' Considering him also as then dead, which is the probable inference from these facts, the right of Savage alone to sell under the will would be good. A power to sell, not merely a naked one, but coupled either with an interest or trust, survives to the surviving executor. (Citations.)"

It is apparent from the above cases that any interest, however slight, or any duty to be performed under the will, with the proceeds, if only to pay legacies or make distribution, will give life to the power and enable it to be executed by the survivor of several to whom it was originally given. Here the proceeds were to be re-invested, and held for the benefit of the testator's wife and children.

In *Robertson vs. Gaines*, 2 Humph., 376, the testator devised all his real estate to his three sons, two daughters and a brother, and further provided in the same clause of his will, "But it is to be understood that out of these lands, before a division of them is made, such as is herein directed, is to be raised by my executors, in such manner as they shall think best a sum of money equal to all my just debts, which they shall appropriate to the payment thereof." He then appointed four executors, two of whom qualified. The principal question arising was whether a conveyance to Catron by only two of the executors of the testator, the other two executors never having qualified or acted as such, was valid to pass the title of the testator to the land in question, and it was held that the power conferred was vested in the executors as such, to be exercised by virtue of the office, for the benefit of the creditors among whom the

fund was to be divided; that the power was coupled with a trust, and might properly be exercised by the two executors who alone qualified.

In *Magruder vs. Peter,* 11 Gill & J., 217, the same facts with reference to the survival of a power are presented as in the case of Peter vs. Beverly in the Supreme Court of the United States, considered *supra,* and the Court of Appeals of Maryland reaches the same conclusion, holding that the executors of David Peter, whose duty it was to pay the debts of the testator, had the right at common law to make the sale, and competent power to pass the legal title, under the will, to a purchaser; that the power to sell was given to the executors by implication, and the trust to apply the proceeds to the payment of debts would continue the power in the surviving executor.

Parsons vs. Boyd, 20 Ala., 112, 117, was an action of detinue to recover a slave. Plaintiff claimed under a deed executed to himself and one Talliaferro, conveying a certain tract of land with several slaves, to secure plaintiff and Talliaferro against their liability as endorsers of a bill of exchange, the deed giving to the grantees the power to sell the property for the purpose of paying the bill and indemnifying themselves. It appeared that Talliaferro had died before the commencement of suit, and it was held that the power was one coupled with a trust, and that plaintiff, as surviving trustee, had the right to execute the trust by selling the property, and therefore the right to recover it in an action of detinue.

In re Cooke's Contract, 4 L. R. Ch. Div., 454, the testator, after stating his desire that a certain farm should be carried on during the life of his wife for the maintenance of herself and her children, and that upon her death all of his property should be "fairly and equally divided' among "all" his children, and that property which had been derived by his

children by a former marriage should be brought into hotchpot, "so as to form one common fund," appointed his "wife and two brothers, William Cooke and Robins Cooke, trustees and executors," and *for the purpose of management* authorized and empowered them to sell and convert into money, or mortgage or lease, all or any part of his estate, and invest the proceeds, and he directed and empowered his "said executors and trustees" to carry on the farm "by and out of" the assets "for the maintenance, support, and benefit of" his wife and children, and, subject thereto, declared that his real and personal estate "and the proceeds thereof" should be held in trust for all his aforesaid children, in equal shares.

It was held that upon the death of the widow the surviving trustees and executors had power to sell and convey the real estate without the consent of the children.

> "Although there is no direct gift to the trustees, I am of opinion that an absolute interest is by the terms of the will conferred upon them and vested in them for the purposes of the will, and, when those purposes are fulfilled, for effecting a division of the property as a common fund amongst the children."

In *May et al. vs. Brewster,* 187 Mass., 524, the will provided: "I direct my executors to proceed with moderation and patience but with due diligence to the winding up of my estate, largely consisting of real estate which is in my opinion of considerable value but more or less encumbered. * * * After the payment of debts and the legacies above named I direct the division of the net proceeds into ——— parts, one for each of my children as follows," naming the testator's four daughters and one son, and providing that the daughters' shares should be held for their benefit by a trustee named. No executor

was named in the will, and administrators *c. t. a.* were appointed. "Taking all the provisions of this instrument together, we have little doubt that the testator intended to have the real estate sold, and the proceeds divided in the settlement of his estate in the Probate Court. Where such an intention is plainly discoverable in a will, it gives to the executors a power of sale, without an express statement to that effect (Citations). This is a power coupled with a trust, and not a mere naked power (Citation). In the present case the direction already referred to is to executors, and in another part of the will there is a reference to the executors, but no executor was appointed, and the estate is being settled by administrators with the will annexed. A power of this kind, given to executors, is atttached to the office and not to the persons. It therefore goes to administrators with the will annexed." (Citations.)

Upon the foregoing principles and authorities, we submit that the Court of Appeals was correct in its conclusion that the power to sell contained in the will of John H. A. Wilson was a power coupled with a trust and with an interest; and, if so, further discussion of the case is superfluous.

(2)

But, if the Court erred in this respect, the inquiry remains whether the power was conferred upon Thomas O. Wilson and Adelaide Wilson as individuals, or in their capacity as executors.

It is the settled doctrine of the common law, from which there has been no departure, that when a power is given to executors *virtute officii*, or, as it is often expressed, *ratione officii*," or *"qua executors,"* upon the death of one the power survives to the survivor or survivors, and may be executed by him or them.

In the examination of the authorities upon this question it may be well to have again before us the exact language of the will under consideration:

> ", —and it is my wish and desire that my executrix and executor hereinafter named shall and may at any time they shall deem best and to the advantage of my said wife and children, sell and convey any part or all of my real and personal estate, and invest the proceeds in good stock or otherwise, as they may consider best, for the benefit of my said wife and children; in fact, to exercise a sound discretion in the management, disposition and investment of my said estate for the purpose aforesaid, to wit, for my wife and children."

Is this not clearly a power given to *the executors?*

In *Sugden on Powers,* 144, it is said:

> "Mr. Hargrave has attempted to establish that, where the power is given to *executors,* or to persons, *nominatim* in *that character,* the survivor may sell, as the power is given to them *ratione officii;* and, as the office survives, by a parity of reason the authority should also survive. And the liberality of modern times will probably induce the courts to hold, that in every case where the power is given to *executors,* as the office survives so may the power."

This statement has been generally accepted as enunciating the true principles of the common law, and has been quoted and approved times without number.

In *Davis vs. Christian,* 15 Gratt., 12, the language of the will creating the power was as follows (italics ours):

> "And should it at any time, in the opinion of my *executors hereinafter named* be deemed necessary by them to sell any or all of the real estate now held

jointly by me and the said Henry Clarke, or by me individually, or jointly with any other person, to enable the said Henry Clarke to *prosecute to greater advantage the said business or to pay the debts which may be owing from the same at any time during the continuance of said business,* I do hereby desire and fully authorize my *said executors hereinafter named* to sell and convey the same in fee simple for that purpose."

The testator appointed his wife, Abby Colton, and Henry Clarke executor and executrix. Both qualified and afterwards Abby Colton died. The court, in upholding the power of the surviving executor to sell, says (at p. 38):

"It is laid down in Sugden on Powers, 144, as a principle of common law, that where a power is given to 'executors,' and the will does not point to a joint exercise of it, even a surviving executor may execute it. The power being given to the executor *ratione officii,* as the office survives so may the power. He says that where the power is given to them *nominatim,* although in the character of executors, it is at least doubtful whether it will survive. Hargrave has maintained that in that case also, as the office survives, by a parity of reason so should the power. And Sugden says, that the liberality of modern times will probably induce the courts to hold that the power survives in every case where it is given to *executors. Id.,* 2 Wms. on Ex., 626. This view is confirmed by the act of Assembly, 1 Rev. Code, c. 104, sec. 52, which seems to regard a surviving executor as being invested with a power in every such case. (Citation.)

"In this case the power is given to the executors, not *nominatim,* but by their official designation only, and clearly survived. That a discretion is given to the executors in regard to the exercise of the power did not prevent it from surviving. (Citation.)"

In *Gould vs. Mather,* 104 Mass., 286, testator by will appointed his wife to be executrix and Henry T. F. Marshall to be executor, gave them all his estate in trust to accumulate under certain terms, and in a separate clause provided that "if it shall be found necessary or expedient to dispose of any of my real property for the benefit of the estate, in the judgment of *my executrix and executor,* I hereby give them full power to do so and invest the sums so received for the benefit of my children." The executor resigned. The court, after referring to the fact that there was nothing in the language of the trust to indicate that the testator expected any part of the estate to be sold, or needed, for the payment of his debts, or the support of his wife or child, and holding that there was no authority to sell the real estate "for the purpose of raising funds for the payment of debts, or in fact for any purpose whatever," but "only for the purpose of changing the form of investment for the benefit of the testator's children, and can only be exercised in pursuance of that purpose," said:

> "It is urged on the one hand that the power is purely discretionary, inasmuch as the will gives no positive direction to sell and does not even express a preference on the part of the testator that there should be a sale; that the will refers the question as to whether there should be a sale or not to the decision of two persons selected by the testator, as if he meant the question should be decided by their concurrent judgment; and that it is a power, the exercise of which is not necessary, or at any rate is far from being indispensable to the proposed settlement of the estate. And it may be urged that there is nothing in the case to show that the contemplated distribution, at the expiration of ten years, could not be made without such sale.
>
> *"But it is to be observed that the power is not conferred upon the two, by name, as individuals.* The

testator does not in that clause even speak of them as 'my *said* executors'; a form of expression which has sometimes been held to be a designation of persons as well as a description of office. *They are designated only by their official titles as 'my executrix and executor.'* * * * The power of sale in question, it is true, may not be, in the literal sense of the word, indispensable to the final distribution of the estate, but it is manifestly subservient and auxiliary to the execution of the trusts, which he has seen fit to connect with the administration of his will. It is certainly appropriate to, and in entire harmony with, the matter of administration which he has pointed out, and the functions which he has thought proper to connect with the office of executor. * * * Upon these grounds, it appears to us that the power is granted *ratione officii*, as one of the incidents of the executorship and intended to secure a more convenient and successful administration of the trusts which the executor had in view; and that it is conferred upon the executors in their official capacity and not as a mere personal trust to them as individuals. If so, and the vacancy had occurred in consequence of the decease of one of the executors, the power could well be executed by the survivor. The authorities cited by the defendant's counsel are full and explicit upon this point. The rule seems to be the same, also, if one of the executors had refused to accept the trust. (Citation.) * * * The power seems to be not a mere naked authority, but is coupled with the trusts of administration, as one of its incidents, and it is exercised as a matter of duty, and not of mere arbitrary discretion, whenever the necessity for its exercise may arise."

See, also:

Chandler vs. Rider, 102 Mass., 268.
May *et al.* vs. Brewster, 187 Mass., 524.
Peter vs. Beverly, 10 Pet., 532.

In *Dick vs. Harby,* 48 S. C., 516, testator devised all his lands to Jno. S. Bradford in trust for use of testator's daughter, Mary Anne Bradford. By another clause he appointed Jno. S. Bradford and Gabriel Wesley Bradford executors. He gave executors power to sell by this clause—

> "If occasion should arise in the opinion of my executors to sell any portion of my estate they are hereby authorized to make such sale and to reinvest the proceeds to such uses as are prescribed in relation to the property sold."

Both executors qualified. Jno. S. Bradford died. Gabriel W. Bradford conveyed the property and the question submitted to the court was—

> "Did the power of sale under the eleventh clause of the will of Rob't Bradford survive to the executor, Gabriel Wesley Bradford, and upon the death of his co-executor could such surviving executor legally execute the power."

The lower court held, and this ruling was affirmed by the Supreme Court, that the power survived.

The court says (p. 526):

> "It must be borne in mind, that the sixth clause of the will, while it appoints John S. Bradford trustee for his sister, simply places legal title to her property in him as such trustee; it was absolutely free of control over such property by him as such trustee. * * * The eleventh clause was evidently provided by the testator for a wise purpose, viz., to create a power to make changes in such trust property; and this power was vested *in the office of the executors of his will, to be used* at their discretion as executors. * * * In

> the nature of things, the two executors might not both live to carry out these trusts; the testator makes no special provision for any such contingency. It must be assumed that he knew that the law clothed the surviving executor with all the power created in the will unless the testator directed otherwise."

This case is quite similar to the case before the court. The power of sale was given to the executors as executors and not by nomination—was discretionary ("if occasion should arise in the opinion of my executors") and the purpose was the same—*i. e.*, to sell and reinvest.

In *Smith vs. Winn*, 27 S. C., 598, the court says:

> "If, however, the power be conferred upon executors as such, without naming those holding that office, and there is nothing to show that it is a personal trust, the execution of the power appertains to the office of executor, and may be performed by the person holding that position, if the execution of the power be necessary to carry into effect the will of the testator.
>
> "In this case the will directed that the testator's property 'be appraised and divided by my executors, hereinafter named,' and nominated three persons as executors only one of whom qualified.
>
> "It cannot be doubted that the power in this case was one coupled with a trust and to be executed by the executors *virtute officii* and necessary to be put into exercise in order to carry out the provisions of the will. Hence it was properly executed by the only person who qualified as executor."

In *Fitzgerald vs. Standish*, 102 Tenn., 383, the facts are very similar to the present case. Testator gave all of his estate to his wife for life and with remainder over to certain men, appointed his wife and his friend, S. C. Williams, executrix and executor. He gave them power to sell his land

"if in their judgment they think best." Williams died and the wife conveyed the land. Though it was urged "that there was an intention, clearly and unmistakably inferable from the will that the testator did not intend a sale of the real estate to be made except it was concurred in both by his executor Williams and his widow, and that testator must have relied most upon the judgment of his friend and not upon that of his wife or he would not have named him as co-executor," the court held that "the widow, as surviving executrix, had the power to make the sale."

In the *Lessee of Zebach vs. Smith*, 3 Binney (Pa.), 69, the will appointed three persons executors and provided that "the executors, namely, George Wolf, Leonard Miller, and Godfrey Rohrer, shall be empowered to sell my land * * * and to give a good right. When my debts are paid, if anything should remain, my wife shall keep two cows, etc." Two of the executors refused to act, but it was held that the fact that the executors were named was not material, as if the testator had used the word "executors" alone, he must have had in his mind the persons whom in another part of his will he had named as executors; that as they were empowered as executors, by their name of office, they had the authority *virtute officii*, and a deed from one passed a good title, upon the refusal or incapacity of the others to act.

This case of Zebach vs. Smith is cited and approved by the court in Taylor vs. Benham, 5 How., 233, cited *supra* at p. 16.

In *Williams vs. Conrad*, 30 Barb., 524, testator directed that all his property remain as it was for use of his wife and minor children until wife died or remarried and children came of age, then to be sold and proceeds divided among children as the law directs. No direct devise was

made to executors nor any express trust in words created in them. The wife and Charles O'Connor were named executors. The property was held intact during the wife's life, and then the court was asked to appoint a trustee to sell. It was held that the real estate of which the testator died seized vested, on his death, in all his surviving children, as his heirs at law, subject to a life estate in the wife for the use of herself and of the children under age and unmarried, and subject to the implied powers given the executors to sell, and that the power survived to the surviving executor to sell and distribute the proceeds among the heirs of the testator.

In *Golden et al. vs. Bressler,* 105 Ill., 419, 433-34, a State bank was closed, and trustees to wind up its affairs appointed by the governor, in accordance with a statute, which also provided that, should any of the trustees "die, resign, or refuse to act, the vacancies may be filled by the remaining assignees, and on their failure or refusal so to do, the governor shall fill such vacancy."

One of the trustees died, and, without having filled the vacancy thereby occasioned, the remaining trustees made a conveyance of the property in question. The contention was that no title passed, because "where several trustees are appointed by name, and all qualify and undertake upon themselves the execution of the trust, they must act as a body, otherwise their acts will be inoperative—that as the power creating them requires them to so act, a conveyance made by one, or any number less than all, is unauthorized, and consequently no title passes."

The court said:

> "We do not question this doctrine at all—on the contrary, we admit it to the fullest extent. But we do not think it has any application to the facts of this case. The question here presented is, are the acts

> of the surviving trustees, who, having a power to fill vacancies, have neglected to do so, absolutely void, or will a conveyance made by them in the due course of business, for value, and without fraud, pass to their grantee the title of the property conveyed? It is clear by the common law, and also by an express provision of the statute, the estate of trustee is held in joint tenancy, and hence upon the death of one of several trustees nothing passes to his heir or personal representatives, but the whole estate devolves upon the survivors. It is evidence, then, that upon the death of Manly the entire legal estate in the property passed to Campbell and Ridgley, the survivors, and no reason is perceived why this interest would not pass by their conveyance. Had Manly been surviving at the time of this conveyance, of course nothing would have passed by it, for the reason, as just shown, that the title to the trust property can only be conveyed by the act of all the trustees having an interest in it. Such interest is an entirety, and can only pass as a whole, hence all the trustees living who have accepted the trust must join in the conveyance, otherwise it will be wholly inoperative. In the case before us the entire interest was represented by the surviving trustees who executed the conveyance, and consequently the title to the property passed to their grantees. Nor will the fact that the surviving trustees, in cases of this kind, are required to fill, from time to time, as they shall occur, any vacancies in their number, make any difference in this respect,"

unless the terms of the power creating the trust imperatively require the vacancy to be filled.

In *Gaines vs. Fender*, 82 *Mo.*, 497, the will vested "in my executors my whole estate in fee simple to enable them to carry into effect my will; with power and authority to convey such parts thereof as I have devised in fee simple;

and with power and authority to sell and convey the residue thereof, including that which will revert to my estate upon the death of my wife for the purposes of my will, and whenever my said executors shall deem proper. But no sale of any porttion thereof to be valid without the concurrence of Henry Clay or Robert Wickliff, two of the executors hereinafter named"; and it nominated and appointed his wife as executrix and four others as executors.

The question arose under a conveyance made "between Henry Clay, only acting executor of James Morrison, deceased," and the executrix and the other three executors "nominated but who have not qualified or acted as executrix and executors," on the one hand, and the grantee on the other.

It was held that a deed by Clay alone would be sufficient. "The power here is given to the executors, and not to the persons. It is a power granted for the benefit of the heirs of the testator and, therefore, a trust, and not a naked power. (Citations.)"

In *Weimar vs. Fath*, 43 N. J. L., 1, the will provided:

> "If at any time *my executors* deem it advisable to sell the land, or any part thereof, it is my will and wish that they should do so, and the moneys raised from such sale to be safely entrusted or invested, and all the interest thereon received from such investment to be given to my wife Anna Margaret, as long as she remains my widow and at her decease or future marriage, to be divided among my children, share and share alike. Lastly, I hereby appoint my loving wife, Anna Margaret, and my brother-in-law, Anthony Weimar, executors of this my last will and testament and guardians to my children during their minority."

The two executors duly qualified and obtained letters, but the wife was subsequently removed from office and her letters revoked.

"It was subsequent to this last event, and in this posture of affairs, that the deed which is now challenged was made. That this will gave the right to the executrix and this executor before the removal of the former, by their joint act, is not in doubt; the uncertainty is, whether such right became vested in the executor, after the executrix had been put out of her executorship. The problem thus presented has two legal aspects; the one in its relation to the common law; the other, in its relation to the statutory regulations existing in this State. Looking at the subject under the first head, it would, perhaps, be too much to say that the decisions demonstrably show that the right to sell this land, on the extinction of the one executorship, was, by operation of law, transmitted to the other executor. Yet, I am inclined to think that if there was no other ground of decision, and the case was to be settled by the test of general principles, that such would be the conclusion to which we would be led. In this instance, as it is clear that no estate was vested by this devise in the executors, we have to do with the topic of the transmissibility, or rather the survival of a naked power. And, with respect to such a contingency, the general rule is, that where a power is given to two or more persons, as individuals, it will not survive without express words. * * * But the legal effect is the opposite of this when, instead of there being an express designation of individuals, there is a designation, as recipients of the authority, of a class of officers, for, in such circumstances, the power is supposed to be intended to be lodged, not in any particular individuals, but in all persons who at any time fill such office."

The court, after reviewing the authorities, including Coke, Sugden, Hargrave, Howell vs. Barnes, Cro. Car., 382, and Brassey vs. Chalmers, 16 Beav., 233, say further:

"In this will the power of sale is given to the *'executors,'* and is not vested in individuals who are

named; and, therefore, in the language of the authorities, as the office survived the authority survived. According to the theory above explained, when the testator said that his executors, when they should deem it advisable, might sell, the meaning was, that such discretionary power should be exercised by a class of officers; and the remaining executor represents that class. In such an instance, as in other like cases, the power is annexed to the office, and not to specified donees of the power."

In *Howell vs. Barnes,* Cro. Car., 382, testator, after devising certain lands to his wife for life, ordered that after her death it be sold by his ***executors thereunder named,*** and the moneys derived from the sale to be divided as directed. The will appointed two executors, one of whom died, and the other, his widow, survived. The judges all agreed that the executors took no interest by the devise, but only an authority, and that the surviving executor, notwithstanding the death of the other, might sell, but expressed a doubt as to whether the reversion should be sold immediately or ought to be stayed until the death of the wife.

In *Brassey vs. Chalmers,* 16 Beav., 233, the will provided:

> "I authorize and empower ***my executors hereinafter named*** with the approbation of my trustees for the time being, to sell and dispose of by private contract, or public auction, from time to time, all, or any part, of my said freehold estates, and to exchange the same, or any part thereof, for other freehold or leasehold property of equal value."

One of the executors having died, as well as the original trustees, for whom substitutes had been appointed, the ques-

tion was whether the surviving executor could sell and convey the designated property. Sir John Romilly, M.R., denied the survival of the power, and held that it was given to the executors *nominatim*, not in their executorial character; but such construction was rejected by the Lords Justices, who held (Brassey vs. Chalmers, 4 De Gex, MacN. & G., 527, 537) that the authority subsisted in the single executor, according to the doctrine of Howell vs. Barnes, Cro. Car., 382.

In accord with the foregoing authorities are:

Story, Eq. Jurisprudence, paragraph 1062.
Terrell vs. McCown, 91 Tex., 242.
Muldrow vs. Fox, 2 Dana, 74.
Simpson vs. Simpson, 73 N. C., 373.
Evans vs. Chew, 71 Penn. St., 47.
Robinson vs. Gaines, 2 Humph., 376.

Counsel for plaintiffs in error cite upon their brief a number of cases where power to executors, *qua executors*, was held to survive. To avoid the effect of these authorities they attempt to draw a distinction between cases where the purpose of sale was for paying debts and legacies and those where the power of sale was for some other purpose, upholding the power in the one case and declaring it void in the other. No such distinction, it is submitted, exists, nor do the authorities support it. In Chandler vs. Rider, *supra*, the power was, not for purpose of paying debts and legacies, but merely "if it shall be deemed best," yet the power was upheld. In Dick vs. Harby, *supra*, the power was for the purpose of reinvestment, as in the case at bar, and it was upheld. In Gould vs. Mather, *supra*, the purpose was reinvestment and the power was upheld. In Davis vs. Christian, *supra*, the purpose was, not for payment of testator's debts, but to "prosecute to greater ad-

vantage said business or to pay the debts which may be owing from the same at any time during the continuance of said business," and the power was upheld. It is true that the power is upheld in cases where the purpose is for paying debts or legacies, but no well-reasoned authority can be shown to support the contention that the power *virtute officii* is limited to this class.

Counsel for plaintiffs in error earnestly urge that it was the testator's intention that, if either his executor or executrix should die, the power to sell the property should fail. We submit that, in view of the surrounding conditions, of the language of the testator, and of the authorities, no construction can be placed upon this will other than that the testator intended that if at any time it became advantageous to his wife and children to have a sale of the property, it should be sold and the proceeds reinvested. He did not know what changes might take place that would require a sale of the property in order best to preserve his estate for them, and so he gave the power of sale, not to his wife and brother, but to those to whom it would be most natural for him to give such a power—"to my executor and executrix"—to those who were appointed by the will to carry out his intention. He must be presumed to have had in contemplation the fact that, in the nature of things, one or the other of the executors might die, and if he had intended that a sale should be made with the concurrence of both or not at all, he would have so stated. He is also presumed to have known the legal effect of the language used, and, having granted the power to his executors, *not by name, but by office*, a presumption arises which is not rebutted but strengthened by the circumstances, that his intention was that any one exercising that office might sell, if it was to the advantage of his wife and children.

That such was the testator's intention is further borne out by examining that part of the will where the testator, referring to his servant Charles, provides that, "he is to meet with good treatment from my *executrix and executor* and to be properly taken care of by them." Can it seriously be urged that testator intended that his servant man was to be well treated by Adelaide Wilson and Thomas O. Wilson, but that if either should die, and the other undertake the performance of the duties of administering the estate, such survivor would be at liberty to disregard the admonition? Obviously it is an injunction upon the *office* and not upon the *individual*, and applies with all its force upon whomsoever the exercise of the duties of that office fell. And if testator used these terms in the sense of applying to the *office* in this instance, what justification can be found for insisting that he did not intend the *same language* to apply with the *same* effect where used with reference to the power?

This view is further supported by a consideration of the Statute of 21 Henry VIII, Chap. 5, Sec. 5, the text of which will be found in Abert's Compilations, page 20, Sec. 85, and which treats of the sale of lands provided for in wills, for the benefit of wives and children, as an executorial function. This statute, it is true, provides only for the case in which some of the executors refuse to act; but, if an "executorial function," it survives to a surviving executor, under all the authorities cited.

This statute provides, only, for cases in which some of the executors refuse to act, and does not extend to those cases in which some have died, for the reason that the latter class of cases was already sufficiently provided for at common law, by the doctrine that, in the case of death, the executorial function survives. By it, acting executors,

when the others refuse to act, "are put upon the same footing with surviving executors." Robertson vs. Gaines, 21 Tenn., 360.

In Keplinger vs. MacCubbin, 58 Md., 203, a direction to executors to sell real estate after the death of certain devisees for life, for the purpose of distribution among the remaindermen, was held to be an executorial duty; while in Hoffman vs. Hoffman, 66 Md., 568 (cited at page 15 in brief of plaintiffs in error), after a devise of the real estate of the testatrix to her four children in equal shares, a codicil provided that the executors might sell and dispose of the proceeds of the real estate under the directions of the will. An objection by purchasers that the executors, having filed their final account, were no longer executors, and therefore could not sell, was held without merit, unless the property had been already partitioned among the devisees in severalty. In other words, this provision that the executors might sell and dispose of the proceeds in the manner directed created an executorial function, which the executors might still discharge after the passage of an account offered by them as their final account, if they had not lost it by permitting the property to be partitioned among the heirs without exercising it.

The authorities in opposition, cited in the opposing brief, so far as they are applicable, are Woolridge vs. Watkins, 3 Bibb., 349, followed by Coleman vs. McKenney, 3 J. J. Marsh, 246, and Clay vs. Hart, 7 Dana, 1; Tarver vs. Haines, 55 Ala., 503; Robinson vs. Allison, 74 Ala. 254; Bartlett vs. Sutherland, 24 Miss., 401; Brassey vs. Chalmers, 16 Beav., 223, and Ferre vs. American Board, 53 Vt., 162. Of these Brassey vs. Chalmers was, as above noted, reversed, in 4 De Gex, NacN. & G., 527, 537; while Ferre vs. American Board, denying the power of the surviving executor to sell under the special circumstances of that

case, is with the defendant in error upon the general proposition involved. In that case, the devise was to the wife for life, with the remainder over to missionary or religious uses, but with a proviso that, if the life interest were not sufficient for the support of the wife and of the testator's mother, the executors were to sell so much of the land as might be necessary for their support. The wife, as surviving trustee, sold for her own support, thereby defeating the remaindermen if the sale were held valid. The court (p. 170) held that the power conferred upon the trustees was more than a mere power; at p. 173 that it was a power coupled with a trust, or one which implied a trust, which became imperative and must be executed, but (p. 175) that the wife could not exercise it in her own behalf, in effect making herself the absolute owner of the property to the destruction of the estates in remainder, and that her proper course would have been to apply to a court of chancery, which would have executed the power insofar as was necessary for her maintenance. In other words, this case holds that the power *is* coupled with a trust, and one which a court of chancery will execute, but one which the person who was both the surviving executor and the beneficiary may not execute in her own interest, so as to convert her life interest into an absolute one, to the prejudice and destruction of the estates in remainder. In the case at bar, the power was, not for the destruction of the interest of the remaindermen, but for better investment, for their benefit, which power as above noted is not even claimed to have been used disadantageously, or otherwise than in accord with the sound discretion contemplated by the will, and for the benefit of the remaindermen.

The remaining cases cited are opposed to what is conceived to be the overwhelming weight of authority, English and American, both numerically and in point of reason.

The Alabama cases, the Mississippi case and the later two cases in Kentucky all refer to and rest upon Woolridge vs. Watkins, 3 Bibb., 349, and stand or fall upon the reasoning and authority of that case. In it, the will gave power to the executors, *qua* executors, of whom but one qualified, to sell or exchange the testator's real property as they might judge necessary for the advantage of his estate. The court, without at all adverting to the fact that the power was given to the executors *as* executors, or to the authorities dealing with a power so conferred, held it to be a naked power, without an interest, and therefore that one could not sell without the concurrence of the others—citing no authorities except Co. Litt., 113 *a*, and Powell on Devises, 294, 304-6. In Taylor vs. Morris, 1 N. Y., 341, in which precisely the opposite conclusion was reached by the court under a will, giving a discretionary power of sale, these Kentucky cases are examined, and are shown not to be supported by the English authorities cited in them, or by the ground upon which they rest, and to be contrary to the American authorities. In Wardwell vs. McDowell, 31 Ill., 364, the court concurs with Taylor vs. Morris in its review of those cases, and declares the distinction attempted to be asserted in them between mandatory and discretionary powers to be unfounded in the English authorities themselves, and to be unsupported by the American decisions.

So in Bay vs. Posner, 78 Md., 42, 48, from which State the District of Columbia derives its laws, authority and power to the executors to sell as they may deem best is declared to be the equivalent of a direction to sell, if a sale ought to be made. In Wood vs. Sparks, 1 Dev. & Batt., 395, it was held that where a power was given to executors to sell lands, it was sufficient that the acting executor or executors living at the time made the sale.

In Kerr vs. Burner, 66 Pa. St., 326, the devise was to two daughters for life, with a power to them to will the remainder to the children of their sister Sarah, or to the children of their brother Thomas, "just as they see proper." A devise by the surviving daughter to the son of Thomas was held a valid execution of the power.

Upon the attempted distinction between mandatory and discretionary powers, the court in Wardwell vs. McDowell, 31 Ill., 364, says: "We cannot recognize any such distinction as that attempted by defendant's counsel between powers mandatory and discretionary. The current of authority is against such distinction. To maintain the distinction reference is made to Woolridge vs. Watkins, 3 Bibb., 349; Coleman vs. McKenney, 3 J. J. Marsh, 246, and Clay vs. Hart, 7 Dana, 1, all decided by the Court of Appeals of Kentucky. * * * No other State seems to have recognized the distinction made by the courts of Kentucky. Zebach vs. Smith, 3 Binney, 69; Chanet vs. Vellepontaux, 3 McCord, 26; Wood vs. Sparks, 1 Dev. & Batt., 395; Brown vs. Armstead, 6 Rand.; Miller vs. Mulch, 8 Penn., 417; McDowell vs. Gray, 29 Penn., 212. Numerous other cases might be cited, but it is not necessary."

In Robinson vs. Allison, 74 Ala., 254, one of the authorities relied upon by the plaintiffs in error, the executors were authorized to sell any part of the estate if necessary for the purposes of division among the testator's wife and children, at public or private sale and upon such terms as the executors might deem advantageous, to be conveyed by the executors or such of them as might be in office as such. The court held that the land was to be *sold* by all, and to be *conveyed* by those who remained in office as such —a distinction, we submit, too narrow to constitute the case a persuasive authority against the great current of authority to the contrary.

In Bartlett vs. Sutherland, 24 Miss., 395, the court, although following Woolridge vs. Watkins, concedes that, where the power of sale is given to executors *'qua* executors, and not *nominatim,'* the power may be exercised by such as qualify, unless the will expressly points to a joint execution. In the case at bar the power is given to the executors, *qua* executors, not *nominatim,* and it contains no provision which points to a joint execution. In Lane vs. Debenham, 11 Hare, cited at pp. 9 and 32 of the opposing brief, a power given to two trustees in trust, at their discretion to raise and invest a sum, by sale or otherwise, the interest of which should be paid to the testator's daughter, was held to survive. Peyton vs. Bury, cited at p. 9, holds, simply, that where an estate is devised to a woman, subject to be defeated by a condition subsequent, namely, her marriage without consent of two persons, the death of one of them, rendering the condition subsequent impossible, defeats it. O'Brien vs. Battle, 98 Ga., 766, and Coleman vs. Connolly, 242 Ill., 574, are no more applicable, the former holding, only, that, under the terms of the particular will, the testator intended that there should be always two trustees to administer the trust—the questions here presented, namely, the effect of a devise to executors, *qua* executors, or a power coupled with a trust, or an interest, being neither discussed by the court, nor before it; while in the latter case, Coleman vs. Connolly, one executor had assumed to act alone although another, who was a minor at the time of the death of the testator, had since become of age and had duly qualified, with no evidence adduced tending to show that the latter had at any time failed or refused to qualify. Robertson vs. Gaines, 21 Tenn. (2 Humph.), 367, cited at the same page, is an authority for the defendant in error insofar as it is analogous at all, being a case in which some of the executors had failed to qualify, which action the court held equivalent to a refusal to do so within

21 Henry VIII, Ch. 4, and that the power was vested in the executors *as such*, to be exercised by virtue of their office, enabling those who did qualify to exercise the power.

Gray vs. Lynch, 8 Gill, 403, is, also, an authority tending to support the judgment below, holding that, although a mere naked power to a trustee to sell, not coupled with an interest, does not survive, yet, though it be a mere naked power *per se*, if in other parts of the will trusts and duties are imposed which require sale, the power survives. The will in that case devised to three persons, by name, to sell and convert into money, and to invest the proceeds in some safe and profitable manner, to be held by them in trust for the sole and separate use of the testator's daughters.

In Cain vs. McCann, 4 Am. Dec., 384, cited at p. 28, in Lockwood vs. Stradley, 1 Del. Ch., 298, cited at p. 32, and in O'Brien vs. Hobson, 3 Marsh. (Ky.), 238, cited at p. 33, there was a power of sale, only, unaccompanied by any trust or executorial duty. In the cases of *In re* Bierbaum, 40 Hun. (N. Y.), 504; Security Co. vs. Snow, 70 Conn., 288; Simmons vs. McKinlock, 90 Ga., 738, and Young vs. Young, 97 N. C., 132, cited at pp. 10-11, a power of sale was given to a single individual, and the question, therefore, of its exercise by a surviving trustee did not arise. In Edgerton vs. Conklin, 25 Wen., 230, the power of sale was special, unconnected with the administration of the estate, and given to the donee of it, not as an executor, but individually, and solely for the purpose of carrying the devise into effect;—see the same case in 21 Wend., pp. 434-5, 436-8. In Walters vs. Margerum, 60 Pa. St., 42, cited at p. 21, the question was whether an administrator *c. t. a.* could execute the power, upon which question there is some difference in the authorities; the case of Zebach vs. Smith, 3 Binney, 69, shows the law of Pennsylvania with respect to the question here under inquiry, and, as stated, was cited with approval by this court in Taylor vs. Benham, 5 How., 233.

In short, as stated, the case of the plaintiffs in error rests upon the authority of the Kentucky, Alabama and Mississippi cases, and can prevail, even upon the point now under consideration, only in the event that the authority and reasoning of those cases shall be found more weighty than the decisions of the other courts in this country and in England.

Perhaps the nearest approach, in its facts, to the case at bar is Bradstreet vs. Clarke, 12 Wend., 602, 662, in which the rule, after giving an estate in fee to the testator's daughters, subject to an annuity to his wife, provided that, "notwithstanding the former devise for the benefit of my wife and daughters, I empower my executors to do all acts and execute all instruments which they may consider requisite to the partition of my landed estate, and I desire the same to be sold by them at such times and in such manner as they shall think most for the interest of my daughters," etc. After discussing the effect of the devise, first to the daughters and then to the executors, the court said: "But the executors took a fee in the testator's landed property, not only by virtue of the term 'estate,' but also by necessary implication from the power given them to sell and dispose of it," and that the surviving executor could sell and convey.

Both upon the ground that the power of sale contained in the will of John H. A. Wilson was a power coupled with an interest and a trust, and that it was a power conferred upon his executors, not *nominatim*, but in their capacity as executors, it is respectfully submitted that the judgment below was right, and should be affirmed.

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WILSON v. SNOW.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 187. Argued March 13, 14, 1913.—Decided April 7, 1913.

The rule that an ancient deed to property in continuous possession of the person producing it proves itself on the theory that the witnesses are dead and it is impossible to produce testimony showing execution by the grantor, is broad enough to admit, without production of the power of attorney, ancient deeds purporting to have been signed by agents.

The other necessary facts being present, and the possession of the property being consistent with its terms and the original records having been lost, a deed, over forty years old containing recitals that it was executed by an administrator under power of sale given by order of the court, will be presumed to have been executed in accordance with such recitals.

Quære, what rule obtains in the District of Columbia as to whether the power to convey given to two persons named in a will may be executed by the survivor when the designation as executors is descriptive of the persons and not of the capacity in which they are to act.

In the District of Columbia a power of sale given to more than one person named in a will as executors, coupled with the active and continuing duty of managing the property, making disposition thereof and changing investments for the benefit of the family of testator, is not a mere naked power to sell, but one that creates a trust which survives and can be executed by the survivor.

Where the duties imposed upon executors are active and render the possession of the estate convenient and reasonably necessary, they will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms.

35 App. D. C. 562, affirmed.

JOHN H. A. WILSON, of Washington County, District of Columbia, by his will, probated March 20, 1858, after providing for the payment of his debts, devised all of his property, real and personal, to his wife, Adelaide Wilson,

during her life of widowhood for the support of herself and his five minor children. In case of her death or marriage the property was bequeathed to the testator's brother, Thomas O. Wilson, in trust for the use of the children.

"And I authorize and empower my said brother to exercise his own judgment and prudence in the discharge of the duties hereby confided to him,—and it is my wish and desire that my executrix and executor hereinafter named shall and may at any time they shall deem best and to the advantage of my said wife and children, sell and convey any part or all of my real and personal estate, and invest the proceeds in good stocks or otherwise, as they may consider, best, for the benefit of my said wife and children; in fact, to exercise a sound discretion in the management, disposition and investment of my said estate for the purpose aforesaid, to-wit, for my wife and children."

There was a provision requiring the executrix and executor to care for his servants; . . . "lastly, I do hereby constitute and appoint my dear wife, Adelaide Wilson executrix and my affectionate brother Thomas O. Wilson executor of this my last will and testament."

The will was probated March 20, 1858. Thomas O. Wilson, one of the executors, died September 21, 1858. On March 8, 1865, Adelaide Wilson made a deed, in which, after referring to the will and its probate and the authority conferred upon herself and her deceased brother-in-law as executrix and executor to sell for the benefit of the wife and children of the testator, she by virtue of the authority vested in her by said will, sold the land to Leonard Huyck, his heirs and assigns forever.

After eight mesne conveyances, duly recorded, the property, in February, 1905, was sold to the defendant, Chester A. Snow, he and his predecessors in title having held continuous possession of the property since 1865.

Adelaide Wilson died March 28, 1906, and on October 23, 1906, the children brought this action of ejectment against Snow. He claimed under the deed of the executrix, but was not able to prove that she had ever qualified as such. A witness who was familiar with the records in the Register of Wills' Office, testified that he had found therein the will of John H. A. Wilson, with an endorsement that it had been approved by the Register of Wills and an entry in a book that the will had been approved and filed, but that he found no other entries or papers to indicate that either Adelaide Wilson or Thomas O. Wilson had ever qualified as executors or received letters testamentary; that the bond book for December 30, 1856, to April 20, 1861, was missing and that in that book the bond of the executors would have been recorded if one had been given; that the books containing the returns of executors from 1856 to 1861 are missing; that he is unable to say whether the qualification of executors would be shown by the bond book alone or not; that he finds no docket entry relating to the case. Another witness who had frequent occasion to examine the records of the Probate Office between 1857 and 1860 testified that during that period the Probate Office was conducted in a negligent manner; that the witness during that period, in searching for original papers which had not been recorded, found them in a mass of others piled together in an empty fireplace in the building.

There was a verdict for the defendant. A motion for a new trial was overruled. The case was taken to the Court of Appeals, error being assigned on the refusal to charge that the burden was on the defendant to prove that the executrix had qualified; that there was no evidence that she had qualified; that the recitals in the deed were not evidence against the plaintiffs, and on the further ground that the court erred in refusing to direct a verdict for the plaintiffs. The judgment of the Supreme Court of the District was affirmed by the Court of Appeals of

the District of Columbia and the case brought here by writ of error.

Mr. Charles F. Carusi and *Mr. John C. Gittings*, with whom *Mr. Eugene A. Jones* was on the brief, for plaintiffs in error.

Mr. J. J. Darlington and *Mr. Hugh H. Obear*, with whom *Mr. William F. Mattingly* and *Mr. Charles A. Douglas*, were on the brief, for defendant in error.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

The plaintiffs, in this action of ejectment, claimed under the will of their father, John H. A. Wilson. The defendant, Charles Snow, claims under a deed executed in 1865 by Adelaide Wilson, the nominated executrix. On the trial there was proof that the will had been probated in 1858, but no record evidence that the executrix had ever taken the oath of office and qualified as such. After showing the loss of certain books and the negligent manner in which the probate office was conducted from 1855 to 1861, the defendant insisted that the recital that the deed had been executed under the power of sale conferred by the will was sufficient to show that the nominated executrix had taken the oath and qualified as such.

The deed was more than 30 years old. The possession of the land had for 40 years been consistent with its terms, and it was therefore, admissible as an ancient deed proving itself on the theory that the witnesses were supposed to be dead, and that it was impossible to produce testimony to show the signing, sealing and delivery by the grantor. This rule has been extended so as to admit ancient deeds purporting to have been signed by agents without the production of the power of attorney,—the same reason

that justified the introduction of an ancient deed, without proof of the signature of the witnesses or grantor, authorizing its admission without proof of the capacity in which, or the power under which, it purported to have been executed. For in many cases it would be quite as impossible to prove the due execution by him as agent as by himself as owner. So that where the other necessary facts are present, and the possession of the land has been consistent with its terms, the ancient deed proves itself, whether it purports to have been signed by the grantor in his own right, as agent under power of attorney, or—the original records having been lost—by an administrator under a power of sale given by order of court, not produced but recited in the deed itself. There are cases which support plaintiffs' contention (*Fell* v. *Young*, 63 Illinois, 106, 110), but the weight of authority sustains the ruling of the court below. In *Baeder* v. *Jennings*, 40 Fed. Rep. 199 (14), 216, 217, Justice Bradley, at Circuit, held that other things concurring, the recitals in an ancient deed were some evidence of the facts recited, and he accordingly admitted the administrator's deed 40 years old, which purported to have been made in pursuance of an order of court which was not produced. A similar ruling was made in *Williams* v. *Cessna*, 43 Tex. Civ. App. 315; 95 S. W. Rep. 1106, where an administrator's deed, executed more than thirty years before the trial, was admitted on the faith of its recitals, proof being made that probate records had been destroyed by fire. In *Willetts* v. *Mandlebaum*, 28 Michigan, 521, a deed reciting that it was made in pursuance of an order in a partition suit, was admitted on proof that the records had been lost, the court holding that the same strict proof was not required of ancient probate proceedings as where they were of recent date.

See, also, *Mumford* v. *Wardwell*, 6 Wall. 423; *Davis* v. *Gaines*, 104 U. S. 386, 398; *Fulkerson* v. *Holmes*, 117

U. S. 389; *Taylor* v. *Benham*, 5 How. 233; *Carver* v. *Jackson*, 4 Pet. 183; *Crane* v. *Morris*, 6 Pet. 598, 611; *Reuter* v. *Stuckart*, 181 Illinois, 529, 540–542; *Buhols* v. *Boudousquie*, 6 Martin (N. S.), 153.

2. The plaintiff, however, insists that, even if the recitals are sufficient to show that Mrs. Wilson had qualified as executrix, her deed could not operate to convey the fee, inasmuch as she could not, by herself, execute the power conferred upon herself and her brother-in-law jointly. It was urged that, in this respect, as in all others relating to the construction of wills, the testator's intention must govern; that he had indicated special confidence in the discretion of his brother, and while contemplating that it might be necessary to sell the property had expressly provided that this could not be done unless both the wife and the brother joined in the deed. It was further argued that this particular testamentary requirement, for the combined discretion of the two, coincided with the general rule that a joint power cannot be exercised by the survivor.

This is true where the power has been given A and B by name, and according to some cases, it is true also where given to A and B, executors. It is not so where the power has been conferred upon A and B, as executors, or where the power is coupled with an interest. These distinctions have given rise to endless controversies and conflicting decisions—a result naturally to be expected where an official title has been treated as a mere means of describing the persons instead of designating the capacity in which they were to act. It is, of course, true that the same persons may be referred to in different capacities in the same will. A and B may be donees of a naked power; or A and B, who are the executors, may be donees of such a naked power, or A and B, executors, may be given a power to be exercised in their official capacity. In Sugden on Powers (144) it was said "that the liberality of modern times will probably induce the courts to hold that in every

case where the power is given to executors, as the office survives so may the power." This prediction has not been altogether fulfilled, though the tendency is to hold that the words "A and B, executors," "A and B, hereinafter named as executors," "my said executors," is not a roundabout means of designating the individuals who are to act, but confer power upon them in their official capacity which may be exercised by the survivor.

The plaintiffs, insisting that the rule contended for by them is a rule of property, argue that the authority to "my executor and executrix hereinafter named" conferred power upon Adelaide Wilson and Thomas O. Wilson *nominatim* and as individuals only—the words executrix and executor being merely descriptive of the persons later referred to by name, rather than designating the capacity in which they were to act. Numerous cases referred to in *Robinson* v. *Allison*, 74 Alabama, 254, are relied on to sustain the contention. Many authorities to the contrary are cited by the defendant in error—among which are *Brassey* v. *Chalmers*, 4 De Gex, McN. & G. 528; *Davis* v. *Christian*, 15 Gratt. 11; *Smith* v. *Winn*, 27 S. Car. 598, where the power was given "executors hereinafter named." *Weimer* v. *Fath*, 43 N. J. L. 1. See also *Gould* v. *Mather*, 104 Massachusetts, 283, 286; *Zebach* v. *Smith*, 3 Binney (Pa.), 69; *Clay* v. *Hart*, 7 Dana, 1; *Wolfe* v. *Hines*, 93 Georgia, 329; *Wood* v. *Sparks*, 18 N. Car. 389.

3. It is unnecessary to attempt to reconcile the authorities or to determine which rule obtains in the District of Columbia. For reading this will as a whole it is clear that the power survived because coupled with an interest. It is true that the will did not specifically give the executors any interest in the land, nor was the word "trust" used by the testator. But the power to sell was coupled with the active and continuing duty of managing the property, making disposition thereof, and changing investments for the advantage of his family. Debts were to be paid

and the executors were to care for the slaves. If in their discretion it became necessary, "my executor and executrix hereinafter named" were to sell all of the property and reinvest the proceeds in good stocks or otherwise; "in fact to exercise a sound discretion in the management, disposition and investment of my said estate [for the benefit and advantage of] my wife and children." This was not a mere naked power to sell, but created an interest or raised a trust which would preserve the power to sell without regard to whether the interest was beneficial to the executors or not. For it is "the possession of a right in the subject over which the power is to be exercised that makes the interest" or creates "an authority coupled with an interest" which "survives for the purpose of effecting the object of the power." *Peter* v. *Beverly*, 10 Pet. 532, 564; *Taylor* v. *Benham*, 5 How. 233; Pomeroy Eq. J. (3d ed.), § 1011.

And even if, as claimed, the power to sell was not mandatory, it was coupled with duties which, though to be exercised at their discretion, could not be arbitrarily disregarded by the executors. The duty of management raised the obligation to care for the property, keep it insured, pay the taxes and collect the rents. Adelaide Wilson and Thomas O. Wilson, whether acting as executors, or as trustees by implication, having accepted the appointment, were bound also to appropriate the income from the land or the dividends from the stock to the maintenance of the family and the education of the minor children. For neglect so to do any one of the *cestui que trust* would have been entitled to maintain a bill against the executors, or trustees, to compel them to discharge the duties for the performance of which full power had been conferred. The rights of the beneficiary would not cease upon the death of either of the representatives, and as the duty to manage survived, and followed the land, so did the coupled power of sale, which was "manifestly subservient and auxiliary

to the execution of the trusts which the testator had seen fit to connect with the administration of his will." *Gould* v. *Mather*, 104 Massachusetts, 283, 286; *Tobias* v. *Ketchum*, 32 N. Y. 319. "For where the duties imposed upon the executors are active and render the possession of the estate convenient and reasonably necessary, they will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms." *Ward* v. *Ward*, 105 N. Y. 68; *Toronto Trust Co.* v. *Chicago &c. R. R.*, 123 N. Y. 37, 44; *Gray* v. *Lynch*, 8 Gill, 404, 423; *Weimar* v. *Fath*, 43 N. J. L. 1.

The duties imposed by the will continued after the death of Thomas O. Wilson and the power to sell was lawfully exercised by Adelaide Wilson, surviving executrix, when she executed the deed to Huyck, the predecessor in title of the plaintiff. The judgment is

Affirmed.